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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 523

CENTRAL TRANSFER COMPANY, PETITIONER,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 23, 1932

CERTIORARI GRANTED JANUARY 9, 1933

(37,220)

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the October Term, 1932, of said Court, before the Honorable Archibald K. Gardner, the Honorable John B. Sanborn and the Honorable Wilbur F. Booth, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it remembered that heretofore, to-wit: on the ninth day of December, A. D. 1931, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Central Transfer Company was Appellant and the Terminal Railroad Association of St. Louis, et al., were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (Citation and Acknowledgment of Service.)

In the District Court of the United States, Within and for the Eastern Division of the Eastern Judicial District of Missouri.

Central Transfer Company, a corporation, Plaintiff,
No. 9582 vs.
Terminal Railroad Association of St. Louis, et al., Defendants.

To Terminal Railroad Association of St. Louis, Baltimore & Ohio Railroad Company, Chicago, Burlington & Quincy Railroad Company, Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Chicago, Rock Island & Pacific Railway Company, Illinois-Central Railroad Company, Louisville & Nashville Railroad Company, Missouri-Kansas-Texas Railroad Company, Missouri-Pacific Railroad Company, Southern Railway Company, St. Louis-San Francisco Railway Company, St. Louis Southwestern Railway Company, Wabash Railway Company, Mobile & Ohio Railroad Company, Illinois Terminal Company, Chicago & Eastern Illinois Railway Company, Pennsylvania Railroad Company, and Columbia Terminals Company, corporations—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, or at such other place as said Court of Appeals may order, thirty days from and after the day this citation bears date, or at such other time as said Court of Appeals may order, pursuant to an appeal from a final decree of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in your favor, passed in a cause, in said court, wherein the Central Transfer Company is plaintiff and appellant and you are defendants and appellees, to show cause, if any there be, why the aforesaid decree should not be reversed

and corrected, and speedy justice should not be done in accordance with the law and the facts of record.

Witness, the Honorable Charles B. Davis, Judge of the District Court of the United States for the Eastern Judicial District of Missouri, this the 5th day of November, 1931.

CHARLES B. DAVIS,
Judge U. S. District Court for the Eastern Judicial District of Missouri.

Service of a true copy of the above citation on this 5 day of November, 1931, is hereby acknowledged.

H. H. LARIMORE,
Attorney for Appellees.

Endorsed: Filed in U. S. District Court on Nov. 5, 1931.

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3 Bill of Complaint.

In the District Court of the United States Within and for the Eastern Division of the Eastern Judicial District of Missouri.

Central Transfer Company, a corporation, Plaintiff,
No. 9582 vs. Div. No.
Terminal Railroad Association of St. Louis, Baltimore & Ohio Railroad Company, Chicago, Burlington & Quincy Railroad Company, Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Chicago, Rock Island & Pacific Railway Company, Illinois-Central Railroad Company, Louisville & Nashville Railroad Company, Missouri-Kansas-Texas Railroad Company, Missouri-Pacific Railroad Company, Southern Railway Company, St. Louis-San Francisco Railway Company, St. Louis Southwestern Railway Company, Wabash Railway Company, Mobile & Ohio Railroad Company, New York, Chicago & St. Louis Railroad Company, Illinois Terminal Company, Chicago & Eastern Illinois Railway Company, Pennsylvania Railroad Company, and Columbia Terminals Company, corporations, Defendants.

1. Your orator, the Central Transfer Company, states to this Honorable Court that it is a corporation, duly organized and existing under the laws of the State of Delaware, and has

and maintains its general offices and principal place of business in the City of St. Louis, in the State of Missouri; that, since 1910, and at all of the times herein stated, it was and is now engaged in the business of an interstate and intrastate common carrier of freight, for hire, by motor trucks and trailers, within and between the City of St. Louis, in the State of Missouri, and the City of East St. Louis, in the State of Illinois; that the defendants, Terminal Railroad Association of St. Louis and Missouri Pacific Railroad Company are Missouri corporations, and the other railroad companies, named as defendants in the caption of this Bill are, and at all of the times herein mentioned, were railroad corporations, duly organized and existing under the laws of the several states of the United States, in which they were incorporated; that each of said defendants now owns and operates, and at all times herein mentioned, owned and operated, as interstate common carriers of freight and
4 passengers, a line of railroad traversing a number of the states of the United States, and entering and serving said Cities of St. Louis and East St. Louis, and the territory immediately adjacent to said cities, and at all times herein mentioned, said defendants were duly authorized by the laws of the State of Missouri to operate their said railroads and to transport thereon freight and passengers in said State; that each of said defendant companies now has and maintains, and at all the times herein stated, maintained its offices and places of business in said City of St. Louis, and State of Missouri; that for convenience said defendant railroad companies will be hereinafter referred to as the railroads, and when so referred to, shall be understood to include all of said defendant railroad companies, unless otherwise made to appear; that the defendant Columbia Terminals Company is a corporation duly organized and existing under the laws of the State of Delaware, and has and maintains its general office and principal place of business in said City of St. Louis and State of Missouri, and at all of the times herein stated it was and is now engaged in the business of an interstate and intrastate common carrier of freight for hire, by motor trucks and trailers, within and between the City of St. Louis, in the State of Missouri, and the City of East St. Louis, in the State of Illinois, and has been and is now duly authorized by the laws of the State of Missouri to engage in such business.

2. Your orator states that the railroads for many years have served and are now serving what is hereinafter described as the metropolitan district of St. Louis, and they control

and carry substantially all of the railroad traffic which passes through, originates at or is destined to said district; that it is one of the largest commercial, manufacturing and industrial districts in the United States, and contains a population of more than 1,200,000, and embraces the City and County of St. Louis and their neighboring Illinois cities and towns; that said communities lie opposite each other on the east and west banks of the Mississippi River, and are connected by one common highway bridge and three combination railroad and common highway bridges, which afford convenient and expeditious social and business intercourse between them; that there is and has been for many years, a large and continuously growing interstate commerce within and between said communities, which is and has been transported, for many years, by a large number of competing transfer companies, draymen and truckmen, as common carriers for hire, in animal-drawn vehicles and motor trucks; that a large portion of said commerce, known as "less-than-carload freight", passes to and from the ontrack freight depots of the railroads, located in said cities, the major portion of which is transported by a large number, to-wit: a number in excess of one hundred competing draymen, truckmen and transfer companies, as common carriers of interstate freight for hire, and the remainder is transported to and from said freight depots by the consignees and consignors themselves, or their private draymen and truckmen; that for more than twenty-five years, the railroads have been the largest employers of the transfer companies in said cities.

3. Your orator states that, in order to render adequate and reasonably efficient service to all consignors and consignees of freight, in said metropolitan district in addition to their ontrack freight depots maintained, in said cities, the railroads, more than twenty years ago, adopted the present practice of employing certain competing transfer companies, including your orator and the Columbia Company, to receive, at the ontrack depots of the railroads, inbound interstate freight, consigned to consignees, in said district, and to transport the same, by the means aforesaid, to and for delivery at freight depots owned and maintained by said competing transfer companies, located away from the rails of the railroads, in said cities, and there deliver such freight to such consignees; that it is, and for many years has been, the practice and custom of the railroads to employ said competing transfer companies, including your orator and the Columbia Company, to receive outbound interstate freight,

at said freight depots, of said transfer companies, from shippers in said district, and to transport the same by dray or motor truck to the ontrack depots of the railroads, for transportation to destination, and to transfer interstate through freight for the railroads between their ontrack depots in said cities; that it was, for many years, and is the custom of said transfer companies, acting as agents of consignees, to make deliveries of inbound interstate freight direct from the ontrack depots of the railroads to the places of business of such consignees in said district, and to gather, for consignors, outbound interstate freight at their doors, and transport it direct to the ontrack depots of the railroads, for transportation to destination; that it is and has been, for years, the practice and custom of the railroads, in their tariffs filed with the Interstate Commerce Commission, to name the transfer companies handling said business for them, as their duly authorized agents, to receive
6 and deliver interstate freight for the railroads, in said cities, and to designate said depots of said transfer companies as places where said freight would be received and delivered by them for the railroads, and to state in said tariffs that all of their St. Louis and East St. Louis rates apply to and from the depots of the transfer companies, designated in said tariffs, as aforesaid; that in employing said transfer companies and in filing said tariffs, the railroads have, for more than twenty-five years, acted independently of each other, and invited and encouraged competition among said transfer companies for said business, and recognized such competition as beneficial to the service rendered by them (the railroads) to the shipping public.

4. Your orator states that by the long usage, custom and practice, aforesaid, the depots, transportation equipment and service of your orator and the Columbia Company have long been and now are a part of the railroad and facilities of each of the railroads employing them and, in law and fact, constitute an extension of their respective lines of railroad; that the St. Louis depots of your orator and those of the Columbia Company, now used in the transportation of said freight, as aforesaid, are located in the downtown shipping district of St. Louis, at distances from the ontrack depots of the railroads, in St. Louis and East St. Louis, ranging from a city block to three miles; that your orator maintains and uses four depots in said City of St. Louis, located at 401, 508-518 and 620 South Third Street, and at 1516 North Fourteenth Street, and the Columbia Company maintains nine of such depots, in said shipping district; that the

railroads, for many years, acting independently of each other, have employed your orator and the Columbia Company, to receive and deliver interstate freight at said depots, for shippers and consignees; that the railroads, in their tariffs, now on file with the Interstate Commerce Commission, and for many years, have published that they will receive and deliver freight at said depots of your orator and the Columbia Company, transported and to be transported in interstate commerce, and that their interstate rates now apply to all of such freight, received and delivered at said depots; that said depots are now and for many years have been open to the use of the shipping public, and have been and are now used by large numbers of shippers and receivers of freight in St. Louis, many of whom habitually prefer to use the depots of your orator, and others those of the Columbia Company.

7 5. Your orator states that, prior to 1918, there were five competing transfer companies, employed by the railroads, acting independently of each other, to receive and deliver freight, as aforesaid, and they were the Columbia Company, St. Louis Transfer Company, Fidelity Transfer Company, McMahon Transfer Company and your orator, all corporations; that the largest of these companies, in respect to equipment, capital investment and volume of business, was, at least for the past thirteen years, and is, the Columbia Company, and in 1918 said Columbia Company acquired all of the capital stock and/or transfer business and properties of the St. Louis Transfer Company, its then largest competitor, and in the early part of 1927, it acquired, through the coercion and oppression of the railroads, all of the capital stock and/or transfer business and properties of the Fidelity Transfer Company, which at that time handled approximately 16% of said traffic, and which was then, and had been for several years, strenuously resisting efforts of the railroads and the Columbia Company, to obtain for the latter a monopoly of said business, by eliminating all of its competitors, as hereinafter alleged; that said Columbia Company, at about the time of its acquisition of said Fidelity Transfer Company, also acquired control of the McMahon Transfer Company, which it now operates as a subsidiary; that upon the acquisition of said St. Louis and Fidelity transfer companies, as aforesaid, the Columbia Company retired said companies from business, leaving your orator as its only active competitor for the transfer of interstate freight for and on behalf of the railroads; that in the year 1926, of a total of about one million tons, the Columbia Company transported for the

railroads, 73.7%, the Fidelity Transfer Company, 16.1%, your orator, 8.5%, and the McMahon Transfer Company, 1.7%; that at the present time, the Columbia Company transports for the account of the railroads, approximately 75% of said tonnage, and your orator about 25% thereof, which is considerably in excess of one-half of all the less-than-carload interstate freight carried by the railroads into and out of said cities.

6. Your orator states that, up to the present time, competition has always existed and now exists in the movement of said traffic for the railroads; that it is, and has been, for several years past, the aim and endeavor of the Columbia Company, with the aid and active co-operation of three or four of the railroads, to unlawfully restrain competition, and to acquire a monopoly of said transfer business done for the account of the railroads, and also a monopoly of and to
8 unduly restrain competition in the transfer of all interstate freight to and from the freight depots of the railroads, in said cities, transferred for the shippers and receivers thereof, by the competitors of the Columbia Company, and, with that intent and as part of its plant to so monopolize said business and unlawfully restrain competition, the Columbia Company, in direct violation of Section 18, of Chapter 1, of Title 15 of the United States Code Annotated, known as Section 7 of the Clayton Act, acquired the capital stock and/or business and control of the said St. Louis, Fidelity and McMahon transfer companies, as aforesaid, and on several occasions, it has sought to acquire ownership and control of your orator; that its efforts to obtain such monopoly and the proposal of the railroads to give said company a monopoly of said business, has been publicly and vigorously fought and protested, for more than four years, by the City of St. Louis, large organizations of shippers and substantially all shippers and receivers of freight in said cities, as highly detrimental to efficient service by the railroads, and not a single shipper or receiver of freight in said cities, though having numerous opportunities so to do, has ever publicly advocated or supported said proposal to give the Columbia Company a monopoly of said business.

7. Your orator states that to further consummate and complete its control, restraint and monopoly of said freight traffic, as aforesaid, the Columbia Company and the railroads, some time in the year 1927, prior to the month of May of that year, the exact date thereof being unknown to your orator, entered into an unlawful contract, combination and conspiracy, in violation of Sections 1 and 2 of the Sherman Anti-

Trust Act, whereby the railroads, excepting the Terminal Railroad Association of St. Louis, mutually and reciprocally agreed among themselves, and with the Columbia Company, that each of the railroads, excepting the last mentioned company, would enter into a separate and independent agreement, in writing, with the Columbia Company, which would contain, among others, a provision obligating each of the railroads not to further employ your orator, as they were then doing, but to employ the Columbia Company only, to handle and do all of its freight transfer business, in said cities, including its interstate business, and to abandon the use and operation of the depots and facilities of your orator, as theretofore employed and used by the railroads, and those depots and facilities formerly owned and operated by the Fidelity Transfer Company; that said individual
9 agreements were to contain a further provision obligating each of the railroads to designate, in its tariffs, the freight depots of the Columbia Company as the only depots of any transfer company or agency, where interstate freight will be received and delivered by it, in said cities, and to and from which its St. Louis and East St. Louis rates will apply; that the Columbia Company has agreed with said combination of the railroads, to enter into such agreements and to perform the same; that on or about March 31st, 1931, with the deliberate purpose and intent of consummating and carrying into binding effect the aforesaid unlawful conspiracy and agreement to destroy the business of your orator, and to unlawfully restrain competition in said business, the railroads entered into a mutual and reciprocal agreement among themselves, designating and appointing the Terminal Railroad Association of St. Louis as their common agent, with full power and authority, to enter into and sign, on their behalf, a binding written agreement with the Columbia Company, containing the contractural provisions and obligations of the aforesaid unlawful contract and agreement; that, pursuant to said appointment and authority, the Terminal Railroad Association and the Columbia Company, at some time in the month of May, 1931, signed and delivered said agreement, authorized and directed by the railroads as aforesaid, to become effective June 1st, 1931; that said unlawful contract and agreement, though entered into and signed as aforesaid, has not yet been carried out or performed, but, according to the information and belief of your orator, which it alleges to be the fact, the railroads are now preparing to carry out said agreement by abandoning and forever discontinuing the use of the depots, facilities and service of your orator, and, unless restrained by some court of competent

jurisdiction, the railroads and said Columbia Company will immediately, fully and completely consummate said contract and agreement, as aforesaid; that the direct effect of said contract, if performed, as aforesaid, and as intended, will be to give the Columbia Company not only a complete and unlawful monopoly of all of the transfer business done for the account of the railroads, in said cities, as aforesaid and unlawfully restrain competition therein, but to destroy the business of your orator, and to render a large part of the shipping public of said metropolitan district dependent upon a monopoly for the expeditious transfer of its interstate freight transported by the railroads; that said unlawful contract, if performed, will directly tend to give the Columbia Company a monopoly of the transfer of all other interstate freight, in said cities, which is now transported by other and competing transfer companies, truck and draymen, and will enable the Columbia Company to unlawfully further restrain existing and future competition among said transfer agencies, in violation of the aforesaid sections of the Sherman Anti-Trust Act.

8. Your orator states it has an investment in its business of the approximate value of Two hundred and fifty thousand dollars and has spent many years in building it up, and derives therefrom a gross annual income of approximately three hundred thousand dollars out of which it receives a fair and reasonable profit; that in the conduct of said business, your orator employs about one hundred men, with a monthly payroll of twelve thousand five hundred dollars, and owns and uses fourteen tractors and sixty-eight trailers, and the freight depots, hereinabove described, for the transportation, receipt and delivery of said freight; that substantially all of the business of your orator is done for the account of the railroads, excepting the Terminal Railroad Association, and, if said unlawful agreement is consummated, as aforesaid, by the railroads and the Columbia Company, the business of your orator will be completely destroyed, to its great and irreparable loss and damage, and for which it has no adequate remedy at law; that but for said unlawful combination and agreement among the railroads your orator would not now be threatened with a loss of its business; that if said unlawful combination and conspiracy is restrained and dissolved by this Honorable Court, your orator will therefore be fully enabled to continue the successful operation of its business, as it has the lawful right to do.

9. Your orator states as its depots, transportation equipment and service have become and are now a portion of the

respective lines of railroad, of each of the railroads, excepting the Terminal Railroad Association, their use and operation cannot be abandoned by the railroads, as herein alleged, without a certificate of public convenience and necessity, granted by the Interstate Commerce Commission; that, with the intent and purpose of consummating the aforesaid unlawful agreement, combination and conspiracy, the railroads, without first having obtained said certificate, are now about to and, unless restrained by some court of competent jurisdiction, will immediately abandon the use of said depots, transportation equipment and service of your orator, as portions of their lines of railroad, in violation of law, all to the great and irreparable injury and damage of your orator, as aforesaid, and a large number of shippers and receiv-
11 ers of interstate freight using and desiring to continue to use said depots of your orator; that by reason of the premises, your orator has no adequate remedy at law.

Wherefore, your orator prays that writs of subpoena may issue from this Honorable Court, directed to the railroads and the Columbia Terminals Company, commanding each to appear in this Honorable Court, on a day certain, and plead to or answer this Bill; that a temporary restraining order be issued to the railroads, enjoining and restraining them, and each of them, from consummating and carrying out the aforesaid unlawful agreement, combination and conspiracy until a hearing may be had on your orator's petition for a preliminary injunction; that a preliminary injunction be issued, enjoining and restraining said railroads from executing and consummating the aforesaid unlawful agreement, combination and conspiracy until a final hearing may be had on the merits of your orator's Bill, and that upon said hearing a perpetual injunction be granted to your orator forever enjoining the defendants and each of them from carrying out or consummating the aforesaid unlawful agreement, combination and conspiracy, and for such other and further orders and decrees as may appear to be just and proper in the premises.

R. M. EILERS and
G. B. ARNOLD
Solicitors for Plaintiff.

State of Missouri,
City of St. Louis—ss.

Henry P. Duncker, of lawful age, being first duly sworn, upon his oath states he is President of the Central Transfer Company, complainant in the foregoing Bill; that he has read

said Bill, and that the statements and facts made and alleged therein are true.

HENRY P. DUNCKER.

Subscribed and sworn to before me this 24th day of August, 1931.

My commission expires: Oct. 27, 1931.

EARL E. PADDON
Notary Public.

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12 Answer.

(Filed Sept. 19, 1931.)

Now come the defendants, Terminal Railroad Association of St. Louis, Baltimore & Ohio Southwestern Railroad Company, Chicago, Burlington and Quincy Railroad Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Chicago, Rock Island and Pacific Railway Company, Illinois Central Railroad Company, Louisville and Nashville, Railroad Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, Southern Railway Company, St. Louis-San Francisco Railway Company, St. Louis Southwestern Railway Company, Wabash Railway Company, Mobile and Ohio Railroad Company, Illinois Terminal Company, Chicago and Eastern Illinois Railway Company, Pennsylvania Railroad Company, and Columbia Terminals Company, Corporations, and for their several answers to plaintiff's bill of complaint herein respectfully state and show to this honorable court as follows:

1. Answering the first paragraph of the bill, they are without knowledge as to whether plaintiff, Central Transfer Company, is a Delaware corporation with principal place of business in St. Louis, Missouri, and as to whether or not it has been engaged in the business of an interstate and intrastate common carrier of freight for hire by motor trucks since 1910, and leave plaintiff to make proof thereof as it may be advised upon the trial of this cause.

13 2. Answering the second paragraph of the bill they admit that defendants have for many years served the district generally known as the St. Louis-East St. Louis district; that they carry and transport substantially all of the railroad traffic which originates in, is destined to or passes through said district; that there is a large amount of interstate traffic handled within and between the said communities

forming said district; that a large amount of less than carload traffic passes to and from the freight depots located upon the railroads of defendants and is handled by truckmen and transfer companies and also by consignors or consigness of freight.

Further answering said second paragraph they deny each and every allegation therein contained not specifically admitted.

3. Answering paragraph three of the bill, they admit that they have employed transfer companies, including plaintiff and the Columbia Terminals Company, to transport less than carload freight for them as their agents, as in said paragraph alleged, but they deny that the present practice represents the most efficient method of handling said traffic, deny that they have invited and encouraged competition among said transfer companies for said business, and deny that they have recognized or do recognize such competition as beneficial to the services rendered by them to the shipping public.

4. Answering paragraph four of the bill, they deny that the depots, transportation equipment and service of plaintiff and of other transfer companies have become or now are a part of the railroad and facilities employing them, or that in law and in fact they constitute an extension of their respective lines of railroad; admit that their tariffs now on file with the Interstate Commerce Commission designate the depots of plaintiff and of the Columbia Terminals Company as places where they will receive from and deliver less than carload freight to the shipping public, except that these defendants deny that they designate in their tariffs the
14 depot of plaintiff located at 1516 North Fourteenth Street, in the City of St. Louis, Missouri.

5. Answering paragraph five of the bill, defendants deny that the Columbia Terminals Company, through the coercion and oppression of defendants, acquired the capital stock, transfer business and properties of the Fidelity Transfer Company, and deny that defendants and the Columbia Terminals Company made any effort for the latter to obtain a monopoly as alleged by plaintiff.

6. Answering paragraph six of the bill, defendants deny that competition has always existed and now exists in the movement of said traffic for the railroads and deny that it now is or has been the aim and endeavor of said Columbia Company, with the aid and active co-operation of three or

four of the railroads, to unlawfully restrain competition, and to acquire a monopoly of said transfer business done for the account of the railroads; and deny that it is the aim and endeavor to acquire a monopoly of and to unduly restrain competition in the transfer of all interstate freight to and from the freight depots of the railroads in said cities, transferred for the shippers and receivers thereof by the competitors of the Columbia Company; and deny that, with that intent and as a part of its plan to so monopolize said business and restrain competition, the Columbia Company violated the Sherman Anti-Trust Act or the Clayton Act, in acquiring the capital stock and business of the St. Louis Fidelity and McMahon Transfer Companies, but aver that neither competition nor commerce have been or are restrained or monopolized by a transfer company acting as the agent or employe of a railroad or the railroads; and deny that the Columbia Company has ever sought to acquire the ownership or control of plaintiff; and deny that said Columbia Company has ever made an effort to unlawfully restrain commerce or obtain a monopoly, or that the railroads proposed to give said company a monopoly of said business.

7. Answering paragraph seven of the bill, defendants deny the Columbia Terminals Company and defendants, or either of them, made any effort to further consummate or complete the control, restraint and monopoly of said freight traffic, as aforesaid, and deny that they, or either of them, during the year 1927, entered into an unlawful contract, combination and conspiracy, in violation of sections 1 and 2 of the Sherman Anti-Trust Act, mutually and reciprocally agreeing among themselves, and with the Columbia Terminals Company, that each of the railroads would enter into a separate and independent agreement, in writing, with the Columbia Company, but defendants aver that each railroad, acting independently of each other, and without coercion of any kind whatsoever, for the purpose of reducing the allowance paid for the haulage of its freight and to expedite commerce and shipping, determined to file tariffs with the Interstate Commerce Commission designating certain places of business of the Columbia Terminals Company as off-track stations only and appointing it its exclusive agent to render the services for it as aforesaid, and, in order to guarantee to it a reduction in the allowances paid, it contemplated entering into a contract with said Columbia Company, which was an incident merely to the tariffs filed; and defendants deny that said Columbia Company has agreed with said combination to enter into such agreement and perform same.

Further answering paragraph seven, defendants aver that a contract was entered into by the Terminal Railroad Association of St. Louis, for and in behalf of the railroad defendants herein, with the Columbia Company, dated June 1, 1931, annexed hereto and marked Exhibit "B", which speaks for itself; and defendants further aver that said contract is merely incidental to the tariffs filed in 1927, and to the determination of each railroad, acting independently, to put in operation the "One-Transfer" plan: and defendants deny that they, or either of them, entered into an unlawful conspiracy and agreement, with the deliberate purpose and intent of destroying the business of plaintiff, and to unlawfully restrain competition in said business, or that the railroads entered into a mutual and reciprocal agreement among themselves; and defendants deny that agreement has not been carried out or performed, but aver that, by the reports of the Interstate Commerce Commission, approving the tariffs filed and the practices enumerated therein, the determination of each railroad is in effect and was at the time of filing this suit, being carried out and performed.

Further answering said paragraph seven, defendants deny that, by their tariffs filed and the incidental contract of June 1, 1931, the Columbia Company will be given a complete and unlawful monopoly of all the transfer business done for the account of the railroads and unlawfully restrain competition therein, or that it will destroy the business of plaintiff or render a large part of the shipping public of said metropolitan district dependent upon a monopoly for the expeditious transfer of its interstate freight transported by the railroads; and deny that the contract is unlawful, or that it will directly tend to give the Columbia Company a monopoly of the transfer of all other interstate freight in said cities, or that it will enable the Columbia Company to unlawfully restrain existing and future competition among the transfer agencies, in violation of the Sherman Anti-Trust Act.

8. Answering paragraph eight of the bill, defendants aver that they are without knowledge regarding and therefore deny the allegations contained in said paragraph that plaintiff's investment in its business is approximately $250,000.00 or that it employs about 100 men, with a monthly payroll of $12,500.00 or that its gross annual income is approximately $300,000.00 out of which it receives a fair and reasonable profit, or that substantially all its business is done for the account of the railroads and defendants deny that the railroads have entered into an unlawful agreement, or if

carried out that the business of plaintiff will be completely destroyed, or that it will suffer great and irreparable loss and damage, or that it has no adequate remedy at law, or that plaintiff is threatened with a loss of its business.

17 9. Answering paragraph nine of the bill, defendants deny that plaintiff's depots, transportation equipment and service have become and are now a portion of the respective lines of railroad of defendants, or that their use and operation cannot be abandoned by the railroads without a certificate of public convenience and necessity, granted by the Interstate Commerce Commission, and aver that not only the railroads, but the plaintiff may without let or hinderance discontinue said depots, transportation equipment and service at its volition, and deny that they, or either of them, intended or purposed to consummate an unlawful agreement, combination or conspiracy; and deny that a certificate of public convenience and necessity is necessary or required to discontinue the off-track stations at plaintiff's places of business, and aver that, if such certificate is required, the Interstate Commerce Commission has by its decisions in this matter granted same; and defendants deny that, by reason of the premises, plaintiff will suffer great and irreparable injury and damage, or that a large number of shippers and receivers of interstate freight using and desiring to use the depots of plaintiff will suffer great and irreparable injury or damage; and deny that plaintiff has no adequate remedy at law.

10. Further answering the bill of complaint herein, defendants say that the matters and things complained of therein along with various other issues, were made the subject of a complete and exhaustive investigation by the Interstate Commerce Commission, that upon the filing of tariffs with it by defendants several years ago said Commission instituted an investigation concerning the receipt, delivery and transfer of freight within the St. Louis-East St. Louis terminal district by means of drays or trucks operated on and over public highways, and concerning the lawfulness and propriety of the practices provided for in said tariffs; that the Commission issued two reports in the premises; that its original report 155 I. C. C. 129, dated May 13, 1929, is hereto attached marked Exhibit C; that its report on further

18 hearing has not yet been printed, but that its mimeograph report dated July 27, 1931, is hereto attached, marked Exhibit D; that therein and thereby said Commission approved the allowances named in the schedules filed by defendants and proposed to be paid to trucking companies and

approved the so-called one-transfer plan proposed by defendants; that said Commission had and has full, complete and exclusive jurisdiction of the subject-matter, including the matters and things complained of in plaintiff's bill; that therefore plaintiff, as a private corporation, is not entitled to maintain this suit, the bill fails to allege facts sufficient to constitute a cause of action and defendants move that the bill be dismissed.

Defendants deny specifically each and every averment in plaintiff's bill of complaint not specifically and expressly admitted in this answer.

Wherefore, having fully answered, defendants ask to be dismissed hence with their costs.

H. H. LARIMORE,
HAROLD R. SMALL,
L. H. STRASSER,
C. S. BURG,
W. N. DAVIS,
GUY A. THOMPSON,
THOS. W. WHITE,
Attorneys for Defendants.

State of Missouri,
City of St. Louis—ss.

Henry Miller, of lawful age, being first duly sworn, upon his oath states that he is President of the Terminal Railroad Association of St. Louis, one of the defendants in the foregoing cause; that he has read the above answer, and that the statements and facts made and alleged therein are true to his best information and belief.

HENRY MILLER.

19 Subscribed and sworn to before me this 19th day of September, 1931.

My commission expires: June 27, 1933.

GEO. W. COLLINS,
(Seal) Notary Public.

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20 Temporary Restraining Order.

Received, Filed and Entered Aug. 28, 1931.

And now this cause coming on to be heard on the plaintiff's application for a temporary restraining order against the defendants, on the 26th day of August, 1931, before the

Honorable Merrill E. Otis, a District Judge of the
21 United States for the Western District of Missouri, in chambers, at Kansas City, in said District and State, the said Honorable Merrill E. Otis, having been assigned to the Eastern District of Missouri by the Honorable Kimbrough Stone, Senior Circuit Judge of the United States for the Eighth Circuit, to hear and determine the said application in the absence from the Eastern District of Missouri of the District Judges for that District, the said Honorable Merrill E. Otis having been directed by the said Honorable Kimbrough Stone to hear said application in Kansas City, Missouri, and the parties consenting thereto, and it being made to appear that the above named defendants were duly served with a copy of plaintiff's bill and notice of this application for temporary restraining order, and the parties appearing on this day and the said Honorable Merrill E. Otis, having read the plaintiff's bill of complaint, and after hearing arguments of counsel of the parties hereto, and having fully considered said bill of complaint and arguments and being fully advised in the premises doth find that upon the allegations contained in the bill the plaintiff is entitled to a temporary restraining order as prayed against defendants.

It Is Therefore Ordered that the railroad and railway companies named in the caption of this order and each of them be and they are hereby restrained and enjoined from in any manner executing, performing, or carrying out, while this restraining order shall be in force, that contract
22 which is referred to and described in the bill of complaint filed in this cause by the plaintiff herein, whereby they did agree among themselves and with each other and with the Columbia Terminals Company, one of the defendants herein, that each of the said railroad and railway companies would enter into a separate and independent agreement in writing with the said Columbia Terminals Company that they would not further employ the plaintiff, the Central Transfer Company, and that they would exclusively employ the Columbia Terminals Company to handle all of their freight transfer business, in the Cities of St. Louis, Missouri, and East St. Louis, Illinois, and that they would abandon the use of the depots and facilities of the plaintiff, the Central Transfer Company, as theretofore employed and used by them, and that they would designate in the tariffs to be filed by them with the Interstate Commerce Commission and various state commissions the freight

depots of the Columbia Terminals Company as the only depots of any transfer company where interstate freight will be received and delivered by them in said cities.

This temporary restraining order shall continue in full force and effect for ten days from its effective date and no longer, unless, before the expiration of ten days, it shall be extended in the manner by law provided.

This order is made upon the allegations of the bill of complaint herein and by reason of an emergency arising from the absence from the Eastern District of Missouri of the Judges thereof and the declared intention of the defendants herein to execute, perform and carry out on Septem-
23 ber 1, 1931, the contract hereinbefore referred to and for the purpose of preserving the status quo until the plaintiff shall have had opportunity to present one of the Judges of the United States District Court for the Eastern District of Missouri its application for a temporary injunction in this cause.

It Is Further Ordered that this order shall not take effect until the plaintiff shall execute and file with the Clerk of the Court in which this cause is pending a good and sufficient bond, to be approved by said Clerk, to the railroad and railway companies named in the caption of this bill, in the sum of Fifteen Thousand ($15,000.00) Dollars, conditioned upon the payment of such costs and damages as may be incurred or suffered by any of said railroad and railway companies who may be found to have been wrongfully enjoined or restrained by this order.

Done at Kansas City, Missouri, this the 27th day of August, 1931, at 9:30 o'clock a. m.

MERRILL S. OTIS,
Judge by assignment of the United States District Court for the Eastern District of Missouri.

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24 (Stipulation that Case May Be Submitted on Merits.)

Filed Sept. 21, 1931.

This cause coming on to be heard on this 21st day of September, 1931, on Plaintiff's motion for a preliminary injunction, it is hereby stipulated and agreed by and between

the parties hereto that this cause may be submitted to and tried by the Court on the merits.

R. M. EILERS &
G. B. ARNOLD,
Attorneys for Plaintiff.

THOS. W. WHITE,
H. H. LARIMORE,
HAROLD R. SMALL,
L. H. STRASSER,
C. S. BURG,
W. N. DAVIS,
GUY A. THOMPSON,
Attorneys for Defendants.

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25 Findings of Fact.

(Offered by Plaintiff)

The Court finds the facts in this cause as follows:

(1) The plaintiff is a corporation, organized and existing under the laws of the State of Delaware, and has and maintains its general office and place of business in the City of St. Louis, State of Missouri.

(2) That, since 1910, it has been and is now engaged in the business of an interstate common carrier of freight, for hire, by motor trucks within and between the City of St. Louis, in the State of Missouri, and the City of East St. Louis, in the State of Illinois.

(3) That the defendants, Terminal Railroad Association of St. Louis, and the Missouri Pacific Railroad Company are corporations organized and existing under the laws of the State of Missouri, and the other railroad defendants are duly organized and existing railroad corporations.

(4) That all of the railroad defendants own and operate, as interstate common carriers of freight and passengers, lines of railroad traversing a number of the states of the United States and entering and serving said cities of St. Louis and East St. Louis, and the territory immediately adjacent to said cities.

(5) That all of said railroad defendants maintain offices and places of business in said City of St. Louis.

(6) That defendant Columbia Terminals Company is a corporation duly organized and existing under the laws of

the State of Delaware, and has and maintains its general office and place of business in said City of St. Louis, and for more than twenty-five years, said defendant has been and is now engaged in the business of an interstate common
26 carrier of freight, for hire, by motor trucks and trailers, within and between said Cities of St. Louis and East St. Louis.

(7) That the railroad defendants now control and have controlled, for many years past, substantially all of the railroad traffic which passes through, originates at, or is destined to said Cities of St. Louis and East St. Louis.

(8) That said cities and the communities immediately adjacent thereto have a population of more than 1,200,000, and constitute a large commercial, manufacturing and industrial district.

(9) That there is and has been for many years, a large and continuously growing interstate commerce within and between said cities, which is and has been transported by a large number of competing transfer companies, draymen and truckmen, as common carriers for hire.

(10) That a large portion of said commerce, known as less than carload freight, amounting approximately to one million tons annually, passes to and from the on-track freight depots of the railroad defendants herein, and which is hauled to and from said freight depots by the plaintiff and the Columbia Terminals Company.

(11) That for more than twenty-five years, and at the present time the railroad defendants herein, acting independently of each other, have, individually, employed transfer or trucking companies to receive from the individual railroad defendants, at their on-track freight depots, inbound less than carload interstate freight, and to haul and deliver the same to its consignees, in said cities of St. Louis and East St. Louis, and to receive from consignors, in said cities, outbound less than carload interstate freight and haul the same to the on-track depots of those individual railroad defendants, over whose railroads said freight was to be carried, and to haul less than carload interstate freight between the on-track freight depots of the several railroad defendants.

(12) That in order to receive said outbound freight from consignors and to deliver said inbound freight to consignees, in said cities, said transfer companies maintained, in the shipping districts, in said cities, what are known as off-track freight depots, between which and the on-track freight de-

pots of the railroad defendants said freight was hauled by said transfer companies, at the cost of the railroad defendant for whom it was hauled.

27 (13) That in 1918, and for a number of years prior and subsequent thereto, the plaintiff, Columbia Terminals Company, St. Louis Transfer Company, Fidelity Transfer Company and McMahon Transfer Company, corporations, were employed by one or more of the railroad defendants to receive, deliver and haul said less than carload freight, as aforesaid; that said transfer companies were engaged in competition, with each other, for the good will and patronage of the individual business of the railroad defendants, and were also engaged in active competition, for the business and good will of shippers and receivers of said freight at said off-track stations.

(14) That in 1918 the Columbia Terminals Company acquired by purchase the capital stock and business of its competitor, the St. Louis Transfer Company, and retired that company from business.

(15) That in December, 1926, the Columbia Terminals Company acquired by purchase one-half of the preferred stock and all of the common stock of the McMahon Transfer Company of East St. Louis, Illinois.

(16) That in June, 1927, the Columbia Terminals Company purchased the Fidelity Transfer Company and retired said company from active business, leaving plaintiff as its only competitor, and in the early part of 1930 said defendant offered to purchase the business and equipment of the plaintiff.

(17) That on or about May 28, 1926, the defendants herein, excepting the Terminal Railroad Association of St. Louis, entered into a combination for the express purpose of effecting the discontinuance of the employment of the plaintiff, the Fidelity and McMahon Transfer Companies, by the individual railroad defendants, and on said last mentioned date, said combination entered into a mutual and reciprocal contract and agreement, whereby the railroad defendants agreed to discontinue, on or before January 1, 1927, the individual employment of the plaintiff, the Fidelity and the McMahon Transfer Companies, and to employ the Columbia Terminals Company, to do all of the interstate railroad hauling for said individual railroad defendants, including that done for them by plaintiff, the Fidelity and McMahon Transfer Companies.

(18) That no one of the railroad defendants herein has any financial interest in whom its co-defendants employ to do the hauling of its individual freight, as aforesaid, and by reason of that fact the court finds that the only motive or purpose of the railroad defendants had in entering into said combination was the power the combination gave them collectively to destroy the competition which then existed among said transfer companies, including the business of the plaintiff, for the good will and business of the individual members of the said combination.

(19) That the motive or purpose of the Columbia Terminals Company in purchasing the stock and business of the St. Louis, Fidelity and McMahon Transfer Companies, and in offering to purchase the business of plaintiff, and in securing the contract with the aforesaid combination to do all of the interstate railroad hauling for the individual members thereof, was to enable it to acquire a complete monopoly of said railroad hauling, by the exclusion therefrom of its said competitors, including the plaintiff.

(20) That said combinations, in order to carry out its plan to destroy competition in the hauling of the aforesaid freight, caused to be prepared separate written contracts to be signed by each of said railroad defendants, individually, on the one hand, and the Columbia Terminals Company on the other.

(21) That said written contracts which each of the railroad defendants had mutually agreed to sign, contain provisions which obligate the railroad defendants, signing the same, to designate the off-track freight stations only of the Columbia Terminals Company, in said cities, for the handling of in and outbound less than carload interstate freight for the account of the railroad signing the same, and to deliver to the Columbia Terminals Company, at the online freight station of the railroad company, signing the agreement, all such less than carload interstate freight as the railroad may desire handled, other than in railroad freight cars, between the online freight station of the railroad in said city of East St. Louis and the online freight stations of the various railroads located in said cities of St. Louis and East St. Louis.

(22) That pursuant to the aforesaid agreement of said combination and as provided in said individual contracts, each of the railroad defendants agreed to designate, in its tariff, to be filed with the Interstate Commerce Commission, the off-track freight depots of the Columbia Terminals Com-

pany only, as off-track freight depots, in said cities of St. Louis and East St. Louis, where less than carload interstate freight would be received for their individual account, and pursuant to said agreement of said combination the railroad defendants, in May, 1927, filed with the Interstate Commerce Commission the tariffs agreed upon, as aforesaid.

29 (23) That said tariffs, filed as aforesaid, were suspended by an order of the Interstate Commerce Commission, and are now under suspension, and by reason thereof have not become operative or effective.

(24) That after forming the aforesaid combination and entering into the aforesaid contract and agreements, the defendants, for some reason not clearly disclosed by the evidence, abandoned that part of the contract and agreement of said combination whereby the individual railroad defendants had agreed to sign individual contracts, as aforesaid, with the defendant Columbia Terminals Company, and on or about the 27th day of May, 1931, the defendant Terminal Railroad Association of St. Louis, acting for and on behalf and by express authority of its co-railroad defendants, and the Columbia Terminals Company, executed and delivered, in writing, a contract of the same general import as the individual written contracts, agreed upon, as aforesaid, and which, among other things, obligates each of the railroad defendants (1) to designate the freight stations of the Columbia Terminals Company, in said cities of St. Louis and East St. Louis, as the only off-track freight stations of each of the railroad defendants for the handling of inbound and outbound less than carload interstate freight for the account of each of said railroads, and (2) to deliver the Columbia Terminals Company, at the on-track freight stations of each of the railroad defendants, located in said cities, all such less than carload interstate freight as each of the railroad defendants may desire handled other than in railroad freight cars, between and amongst their individual on-track freight stations, located in said cities, and (3) to file necessary amended tariffs with the Interstate Commerce Commission.

(25) That said contract between said Terminal Railroad Association and said Columbia Terminals Company became effective June 1st, 1931, but by reason of the suspension of said tariffs, as aforesaid, the same has not yet been put into effect and operation.

(26) The court further finds from the evidence that the plaintiff was, for many years, and is now engaged in interstate commerce, and during the period prior to May 28, 1926,

plaintiff enjoyed the good will and patronage of the railroad defendants, and is now employed by each of them individually, under contracts terminable at will, to haul their said freight, as aforesaid.

(27) That the plaintiff owns and uses in its said business fourteen tractors and sixty-eight trailers, and hauls, annually, for the railroad defendants about one hundred and fifty thousand tons of less than carload freight; that it has one hundred employees to conduct its said business, and has a monthly payroll of about fifteen thousand dollars; that the value of its investment in its said business is about two hundred and fifty thousand dollars; that its gross annual income from said business is about three hundred thousand dollars, from which it derives a profit; that ninety-five per cent of its aforesaid gross income is derived from the business plaintiff does for the railroad defendants.

(28) That if the aforesaid contract of said Terminal Railroad Association and said Columbia Terminals Company and the tariffs, aforesaid, are permitted to become effective and go into operation, and the terms and provisions of said contract are performed by the defendants herein, the direct, necessary and intended effect of the same will be to destroy ninety-five per cent of the interstate transportation business and commerce of the plaintiff, and the income therefrom, and to inflict upon it great and irreparable loss and damage, for which plaintiff has no adequate remedy at law.

(29) That on the facts so found the plaintiff is entitled to the relief prayed for in its Bill of Complaint.

.....
Judge.

(Findings of Fact and Conclusions of Law Offered by Defendants and Adopted by District Court.)

(Filed Oct. 19, 1931.)

Defendants submit the following proposed findings of fact and conclusions of law to be made under equity rule 70½ on application for permanent injunction.

Findings of Fact.

1. This is an application by plaintiff for a permanent injunction and the facts hereinafter found appear from the sworn petition, the sworn answers thereto, the exhibits attached to such answers, and the oral and documentary evi-

dence offered at the hearing of said application on the 21st day of September, 1931.

36 2. Plaintiff is a corporation organized under the laws of the State of Delaware, with its general offices and principal place of business in the City of St. Louis, Missouri, and at all times herein stated was and is now engaged in the business of hauling freight for hire by motor trucks within the St. Louis, Missouri, and East St. Louis, Illinois, district.

3. The defendants are corporations, and, except the Columbia Terminals Company, are and were at all times mentioned herein, common carriers of property and passengers by railroad subject to the Interstate Commerce Act.

4. For many years prior to the filing of the bill of complaint defendants, carriers by railroad, maintained and now maintain certain off-track stations located in the Cities of St. Louis and East St. Louis. The rails of certain lines end in East St. Louis, but the tariffs of such carriers on file with the Interstate Commerce Commission provide rates to and from the City of St. Louis, Missouri, and such carriers hold themselves out to deliver at and ship from St. Louis less-than-carload freight and employ transfer companies, including plaintiff, to transport such less-than-carload freight between the ends of their rails in East St. Louis and off-track stations of such carriers in St. Louis.

Carriers by railroad operating west of the Mississippi River and in the City of St. Louis maintain off-track stations in North and South St. Louis and employ transfer companies, including plaintiff, to transport less-than-carload freight between such off-track stations and on-track stations of said west-side carriers.

37 There is also involved the movement by truck of less-than-carload freight between the on-track station of one carrier and the on-track station of another in interchange.

5. These off-track stations, so-called, are generally places of business of transfer companies, including the places of business of the Columbia Terminals Company, and of the plaintiff, and are duly designated and named in tariffs on file with the Interstate Commerce Commission as points at which such carriers will receive and deliver less-than-carload freight.

6. For several years prior to May 25, 1927, the defendants, carriers by railroad, had been giving consideration to

changes in the method of handling less-than-carload freight at St. Louis and East St. Louis, such consideration having to do with the cost of the service being performed by transfer companies, with the question of reducing the number of off-track stations, and with the question of employing one transfer company to perform such services for all carriers by railroad involved.

7. In response to numerous petitions filed with the Interstate Commerce Commission, hereinafter for brevity referred to as the Commission, by certain teaming associations, transfer companies and others, the Commission on May 2, 1927, ordered a general investigation concerning the lawfulness of methods then in effect at St. Louis and East St. Louis having to do with the receipt and delivery by dray or truck of less-than-carload freight at those points.

8. On May 25, 1927, the carriers by railroad, through their joint publishing agent, filed with the Commission
38 their tariff, I. C. C. No. 1950, effective July 1, 1927, whereby it was proposed to reduce the number of off-track stations then in existence at St. Louis from twelve to seven, and to reduce such stations at East St. Louis from two to one. Such tariff provides for the application of rates to such off-track stations. Of the five off-track stations to be eliminated at St. Louis, two were operated by the Columbia Terminals Company, and three by the Central Transfer Company, plaintiff in this case. At East St. Louis the off-track station to be eliminated was operated by the McMahon Transfer Company, controlled by the Columbia Terminals Company.

9. This tariff was protested by teaming associations, transfer companies, the Chamber of Commerce of St. Louis, etc., and on June 20, 1927, the Commission suspended for the statutory period the schedules contained in such tariff and entered upon an investigation as to the lawfulness of such schedules. Through acquiescence of the carriers the schedules contained in such tariff have been postponed from time to time until they are now to become effective by proper supplement on November 1, 1931.

10. The issues involved in the general investigation ordered by the Commission heretofore referred to bear that body's Docket No. 19,594, and the issues involved in the investigation and suspension proceeding concerning the lawfulness of the tariff referred to bear Docket No. 2934. Both proceedings were consolidated and heard on a common record com-

mencing November 1, 1927. Such hearing involved, in so far as this proceeding is concerned, the lawfulness of the methods in effect at St. Louis and East St. Louis in
39 connection with the handling of less-than-carload freight by truck or dray between the off-track and on-track stations of the carriers at those points and in interchange between the on-track stations of the carriers. It also involved the schedules contained in the tariff referred to reducing the number of off-track stations at St. Louis and East St. Louis.

11. Following such hearing the matter was briefed by all parties interested, orally argued before the Commission on October 10, 1928, and a report rendered by the Commission on May 13, 1929. This first report of the Commission appears at 155 I. C. C. 129.

12. In such first report the Commission found that the carriers were within their lawful rights in employing one transfer company to handle less-than-carload freight between off and on-track stations and between on-track stations within the St. Louis and East St. Louis switching district, stating:

"That the proposal of carriers, other than the Chicago & Alton, to employ a single transfer company for the operation of off-track stations and the haulage between such stations and the on-track stations of the railroads, and in the interchange of freight between railroads, is not violative of any provision of the Interstate Commerce Act.

"That the proposal of carriers, other than the Chicago & Alton, to reduce the number of off-track stations in St. Louis from 12 to 7, and at East St. Louis from 3 to 2, will not be harmful to the public interest or result in unreasonable and inadequate service.

40 "That the present and proposed maintenance of a constructive station at the west end of Eads Bridge as an aid to the direct receipt and delivery of freight from and to shippers and consignees is not unlawful and as at present operated, does not result in unlawful practice."

The Commission, however, declined to approve the allowances proposed to be paid for such services on the ground that such allowances were not based upon cost study and required the carriers to make a cost study and submit the result thereof to the Commission.

13. The matter was set for further hearing by the Commission and heard at St. Louis on June 3, 1930. Following such further hearing, the cause was again briefed by the parties in interest, again orally argued before the Commission on June 24, 1931, and previously was further heard at Washington as to contract of June 1, 1931.

14. On July 27, 1931, the Commission handed down its second report and order, now in mimeographed form, in which it approved the allowances proposed to be made to the transfer company, and also found that the suspended schedules contained in the tariff referred to reducing the number of off-track stations in the St. Louis-East St. Louis district as proposed in such schedules were justified, stating:

"We find that the suspended schedules, other than those filed by the Alton, have been justified. We further find that the suspended schedules filed by the Alton have not been justified. Orders will be entered requiring the cancellation of the latter schedules and discontinuing those proceedings."

41 15. By reason of the foregoing reports and orders of the Commission the carriers were authorized to employ one transfer company to transport by truck the less-than-carload freight of the carriers by railroad between on-track stations and between off-track and on-track stations of the carriers by railroad at St. Louis and East St. Louis, and to reduce the number of on-track stations in accordance with the tariffs then on file with the Commission and to become effective on November 1, 1931.

16. The off-track stations provided for in the tariff approved by the Commission to become effective hereafter are located only at the places of business of the Columbia Terminals Company, such schedules eliminating from existing tariffs places of business of the Central Transfer Company, plaintiff herein, and providing for application of rates to off-track stations named.

17. During the period between the handing down by the Commission of its first and second reports, to-wit, on September 21, 1931, the Central Transfer Company, plaintiff herein, attempted to secure for itself a contract whereby it would be the sole agent of the carriers in performing the services involved, but by contract dated June 1, 1931, the Columbia Terminals Company became the sole agent of the carriers to perform such services.

18. This contract was entered into between the Terminal Railroad Association of St. Louis on behalf of its proprietary lines and the Columbia Terminals Company, and the services to be performed by the Columbia Terminals Company
42 in connection with the handling of certain less-than-carload freight are, in so far as material here, described as follows:

"(a) Between 'on-track' freight stations of the railroads in St. Louis, Missouri, and the said 'off-track' freight stations in East St. Louis, Illinois.

"(b) Between 'on-track' freight stations of the railroads in East St. Louis, Illinois, and the said 'off-track' freight stations in St. Louis, Missouri.

"(c) From the said 'off-track' freight stations of the railroads in St. Louis, Missouri, to the 'on-track' freight stations in St. Louis, Missouri, (See note in paragraph (e) on page 6.)

"(d) Between 'on-track' freight stations of the railroads located in St. Louis, Missouri (interchange service).

"(e) Between 'on-track' freight stations of the railroads located in East St. Louis, Illinois (interchange service).

"(f) Between 'on-track' freight stations in St. Louis, Missouri, and 'on-track' freight stations in East St. Louis, Illinois (interchange service)."

19. The railroads agree in such contract, in part, as follows:

"Section 25. To designate the freight stations specified in sections Nos. 1 and 2 of this agreement as to the only 'off-track' freight stations of the railroads in the City of St. Louis and the City of East St. Louis for the handling of inbound and outbound less-than-carload freight for account of the railroads except as modified by sections 21 and 22 herein.

"Section 26. To deliver to the contractor at the 'on-track' freight stations of the railroads located at St. Louis,
43 Missouri, and East St. Louis, Illinois, all such less-than-carload freight as the railroads may desire handled other than in railroad freight cars, between and amongst the 'on-track' freight stations of the railroads located in St. Louis, Missouri, and East St. Louis, Illinois.

"Section 27. To file the necessary amended tariffs with the Interstate Commerce Commission, the Public Service

Commission of Missouri and the Illinois Commerce Commission, effective June 1st, 1931, and to make weekly settlements for the services described herein at the agreed charges as follows:"

Then follows the allowances to be made for the services described particularly in paragraph 18 hereof.

20. The contract of date June 1, 1931, received the approval of the Commission as to the allowances in the report of that body of date July 27, 1931.

21. In the reports filed by the Commission following the general investigation heretofore referred to and the investigation and suspension proceedings involving the schedules contained in the tariff filed by the carriers with the Commission reducing the number of off-track stations, the Commission found that the question of whether the carriers should be permitted to reduce the number of off-track stations, the services performed by trucking companies as agents of the carriers between such off-track stations and on-track stations of the carriers, and the transfer of less-than-carload freight in interchange between the on-track stations of the carriers were within the administrative powers and authority of the Commission, and that what was proposed to be done
44 by the carriers in this regard was not in violation of the antitrust laws of the United States.

The Commission further found that, based upon a handling of 830,514 tons, which the carriers stated is the total off-track and interchange service for a normal year, that the reduced rates for such service provided in the contract heretofore referred to would result in a saving of $181,398.37 annually; and also found that the carriers estimated that the discontinuance of the use of off-track stations by the St. Louis-San Francisco and the Missouri Pacific and the partial discontinuance of the use of such stations by other westside lines as provided in such contract would effect an annual saving of $125,000.00, or a total saving of $306,398.37. At the hearing for permanent injunction testimony was offered by the carriers to the effect that the one-transfer plan and the reduced allowances provided for in the contract would result in an annual saving of approximately $250,000.00 per year.

22. On July 24, 1931, plaintiff filed in this court its bill of complaint, wherein it is alleged that the contract entered into between the carriers by railroad and the Columbia Terminals Company is an unlawful combination in restraint of trade and commerce, and that the carrying out by the carriers of

such contract would be in violation of Sections 1 and 2 of the Sherman Antitrust Act.

It is also alleged that the arrangement whereby the Columbia Terminals Company is to become the sole agent of the carriers in handling less-than-carload freight between off-track and on-track stations of the carriers and between
45 off-track stations (in interchange) of the carriers at St. Louis and East St. Louis would be an unlawful monoply in violation of the said Sherman Antitrust Act; that plaintiff herein is engaged in interstate commerce; that such proposed arrangement would be a combination in restraint of trade and commerce and would unlawfully restrain commerce in which plaintiff was engaged, and would destroy the business of plaintiff.

The relief sought is a permanent injunction prohibiting the defendants from putting into effect the so-called one-transfer plan, from making effective the provision of the tariff now on file with and approved by the Commission, and, in addition, a mandatory injunction is sought requiring the carriers to file with the Commission a tariff designating the places of business of the plaintiff in St. Louis as off-track stations of the carriers.

23. No relief is asked against the Columbia Terminals Company.

24. Defendants, carriers by railroad, interpose the following defenses:

(a) That the matter involved is subject to the administration, supervision or other jurisdiction of the Commission, and that plaintiff as an individual cannot maintain this suit.

(b) That the arrangement whereby the Columbia Terminals is made the sole agent of the carriers to haul by truck less-than-carload freight being transported by such carriers between off-track and on-track stations of the carriers, and between on-track stations (in interchange), is not in violation of the antitrust laws of the United States.

(c) That the services in controversy to be performed
46 by truck between off-track and on-track stations of the carriers is a terminal service, constitutes the facilities of the carriers, the lawfulness of which is within the jurisdiction of the Commission, and that the interchange service between the on-track stations of the carriers to be performed by truck is also within the jurisdiction of the Commission.

The defendants ask that the bill be dismissed.

Conclusions of Law.

1. The Interstate Commerce Commission has authority to inquire into the management of the business of all common carriers subject to the provisions of the Interstate Commerce Act, and is required to keep itself informed as to the manner and method in which the same is conducted, and the Commission in terms is authorized and required to execute and enforce the provisions of the Interstate Commerce Act.

Section 12, Interstate Commerce Act (U. S. Code, Title 49, Sec. 12).

The investigating and supervising powers of the Commission extend to all of the activities of carriers and to all sums expended by them which could affect in any way their benefit or burden as agents of the public.

Smith vs. Interstate Commerce Commission, 245 U. S. 33.

The powers of the Commission must necessarily be expressed in generalities. A precise specification of
47 powers might work a limitation and all not enumerated be asserted to be withheld (Smith vs. Interstate Commerce Commission, supra).

2. In section 1 (2) of the act (U. S. Code, Title 49, Sec. 1) transportation is defined to include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract, expressed or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.

The foregoing includes such service as would be performed by trucking companies in the handling of less-than-carload freight between off-track and on-track stations of the carriers and between on-track stations in interchange.

By section 1 (4) of the act it is made the duty of every common carrier subject to the act engaged in the transportation of passengers or property to "provide and furnish such transportation upon reasonable request therefor."

By section 1 (10) of the act car service is defined to

"include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this act."

By Section 1 (11) of the act it is made the duty of every carrier by railroad subject to the act to

48 "furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations, and practices with respect to car service, and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful."

3. In view of the definition of "transportation," the term "car service" is broad enough to include the services performed by trucking companies between on-track and off-track stations of the carriers and between on-track stations of such carriers, and the Commission may condemn as unlawful and require to be canceled any tariff provisions which prevent or seriously threaten the performance of the carriers' duties under paragraphs (4) and (11) of section 1 of the act.

4. The service between on-track stations constitutes interchange service and is placed within the control of the Commission by paragraph (3) of Section 3 of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 3), as follows:

"All carriers engaged in the transportation of passengers or property, subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such

49 connecting line in the distribution of traffic that is not specifically routed by the shipper."

The term "reasonable, proper and equal facilities" is broad enough to include not only trackage, but other terminal facilities.

Interstate Commerce Commission vs. United States ex rel., City of Los Angeles, 280 U. S. 52.

The compliance of a carrier by railroad with the provisions of paragraph (3) of section 3 of the act may be enforced by the Commission and an order made by the Commission supported by testimony cannot be attacked in the courts:

Pennsylvania Co. vs. United States, 236 U. S. 351.

5. The tariff now on file with the Commission and to become effective November 1, 1931, provides for application of rates from and to certain off-track stations to be maintained by the carriers and designated in such tariff. There is involved, therefore, the application of rates of the carriers and certain services under such rates. These are matters committed to the jurisdiction of the Commission.

Texas and Pacific Rwy. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426;

Baltimore & Ohio R. R. vs. Pitcairn Coal Co., 215 U. S. 482.

6. When the schedules reducing the number of off-track stations thereafter to be maintained by the carriers and providing for application of the linehaul rates of the
50 carriers thereto were filed with the Commission, the question presented to the Commission was whether, if such tariff became effective, reasonable and adequate facilities and service with respect to the receipt and delivery of less-than-carload freight at St. Louis and East St. Louis would be available. This presented the further question of the lawfulness of such tariff. All of these questions were for the Commission.

Transfer of Freight Within St. Louis, etc., 155 I. C. C. 129;

Discontinuance of Off-Track Stations in New York City, 173 I. C. C. 727, 730.

7. The contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, while not controlling is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it be clear that such construction is erroneous.

United States vs. Finell, 185 U. S. 235;

New York, etc., R. Co. vs. Interstate Commerce Commission, 200 U. S. 361;

California vs. Deseret Water Co., 243 U. S. 415.

8. By Section 6 of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 6) every common carrier subject to the act is required to file with the Commission schedules showing all the rates, fares and charges for transportation between different points on its own route, and between points on its own route and points on the route of any other carrier, and

the tariff involved in this controversy withdrawing the
51 application of rates to certain off-track stations was required to be filed with the Commission by the provisions of said section 6. Also, the Commission was authorized under section 15 (7) of the act, when the carriers filed schedules reducing the number of off-track stations at St. Louis and East St. Louis and withdrawing the application of the line-haul rates therefrom and providing for the application of such rates to the off-track stations described in such schedules, to enter upon an investigation of the lawfulness and reasonableness of such schedules.

9. The Clayton Act (U. S. Code, Title 15, Sec. 26) provides, in substance, that any person, firm, corporation or association shall be entitled, among other things, to injunctive relief in the courts of the United States against threatened loss or damage by violation of the anti-trust laws, provided:

"That nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission."

The matter here involved is subject to the regulation and supervision of the Commission. Plaintiff, therefore, is not entitled to the injunctive relief sought.

General Investment Company vs. New York Central R. R. Co., 271 U. S. 228.

52 Even though the matter involved has been made the subject of a contract or agreement between the carriers by railroad, on one hand, and the Columbia Terminals Company, on the other, if such matter is within the regulation, supervision or other jurisdiction of the Commission, no recovery can be had in an injunctive proceeding, except in a suit brought by the United States.

Keogh vs. C. & N. W. Ry. Co., 260 U. S. 156.

10. The services to be performed are in their nature terminal services and consist of receipt and delivery and handling in interchange of less-than-carload freight at St. Louis and East St. Louis.

11. An agreement among the carriers by railroad to employ one transfer company in the collection and distribution

and interchange of less-than-carload freight at St. Louis and East St. Louis is not in violation of the Sherman Antitrust Act.

Transfer of Freight at St. Louis, 155 I. C. C. 129;

United States vs. Terminal R. R. Association, 224 U. S. 383;

Terminal Railroad Association vs. United States, 266 U. S. 17.

12. The arrangement of the carriers by railroad for the employment of one transfer company to handle railroad freight between off-track and on-track stations of such carriers at St. Louis and East St. Louis and between on-
53 track stations at such points, does not contravene or violate Sections 1, 2, or either of them, of the Sherman Antitrust Act, or any other provision of the Antitrust Laws of the United States. The right of carriers by railroad in the conduct of their business to employ one individual or corporation to the exclusion of others has been upheld in many cases.

Skaggs et al. vs. Kansas City Terminal Railway Co. et al., 233 Fed. 827;

Donovan vs. Pennsylvania Company, 199 U. S. 280;

Express Cases, 117 U. S. 1;

St. Louis Drayage Company vs. Louisville & Nashville R. R., 65 Fed. 39;

Atchison, T. & S. F. R. R. Co. vs. Denver & N. O. R. Co., 110 U. S. 680;

B. & W. Taxi Co. vs. B. & Y. Taxi Co., 276 U. S. 518;

United States vs. Terminal R. R. Association, 224 U. S. 383.

13. The Sherman Antitrust Act applies only to contracts which directly and immediately restrain interstate commerce.

Standard Oil Company vs. United States, 221 U. S. 1;

United States vs. Joint Traffic Association, 171 U. S. 503.

14. The interstate commerce here involved is transported by the railroads under their line-haul rates, and plaintiff and other trucking companies perform certain termin-
54 al services as agents of the carriers. Neither the plaintiff nor any other trucking company handling the

traffic here involved acts otherwise than as agent for the carriers by railroad and transports no commerce for its own account. The public knows only the railroads in the transaction. The carriers may unquestionably provide a joint facility owned by them for the purpose of securing performance of the terminal services now being performed through transfer companies, including this plaintiff, and what carriers might own and operate they may contract for without violating any of the provisions of the Antitrust Laws of the United States. The movement of interstate commerce will not in anywise be affected by the so-called one-transfer plan, except that the plaintiff will cease to be employed by defendants. Nonemployment by the carriers of plaintiff is not a direct burden on or restraint of interstate commerce.

15. This Court is without authority to enjoin the application of a tariff on file with the Commission and not to become effective until November 1, 1931, and is also without authority to, by a mandatory injunction, require a carrier by railroad to file a tariff with the Commission.

Columbus Iron & Steel Co. vs. Kanawha & M. Ry. Co., 171 Fed. 713;

Director General of Railroads et al. vs. Viscose Co. 254 U. S. 498.

55 16. The plaintiff is not entitled to recover, and the bill should be dismissed on its merits.

Respectfully submitted,

C. S. BURG,
D. P. CONNELL,
W. N. DAVIS,
A. H. KISKADDON,
H. H. LARIMORE,
M. G. ROBERTS,
HAROLD R. SMALL,
L. H. STRASSER,
THOS. W. WHITE,
Attorneys for Defendants.

Edward J. White,
J. M. Bryson,
E. T. Miller,
N. S. Brown,
T. M. Pierce,
Of Counsel.

The Court adopts and makes the foregoing Findings of Fact and Conclusions of Law.

CHARLES B. DAVIS, J.

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58 Final Decree.

(Filed Oct. 19, 1931.)

This cause came on to be heard on the 21st day of September, 1931, and by stipulation duly signed by counsel for plaintiff and defendants and filed in this court it was agreed that such hearing should be on the application of plaintiff for a perpetual injunction as set forth in its bill of complaint filed herein.

Whereupon the cause was submitted to the Court upon the verified bill of complaint, sworn answers thereto of the defendants filed herein, the exhibits attached to such answers, oral and documentary evidence offered by plaintiff and defendants, and after arguments of counsel was taken under advisement by the Court.

Now, this 19th day of October, 1931, the Court having considered this cause on its merits, all of the evidence therein, arguments and briefs of counsel for plaintiff and defendants, and having found the facts specially and stated separately its conclusions of law thereon, upon which this decree is based, and being fully advised in the premises, doth find that plaintiff is not entitled to the relief prayed for in its bill of complaint, and that its application for a permanent injunction should be denied.

It is, therefore, ordered, adjudged and decreed that the application of plaintiff for a permanent injunction herein be, and the same is, hereby denied.

It is further ordered, adjudged and decreed that plaintiff's bill of complaint be, and it is, hereby dismissed with costs to the defendants.

CHARLES B. DAVIS, Judge.

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59 (Petition for Appeal.)

(Filed Nov. 5, 1931.)

To the Honorable Charles B. Davis, Judge of the United States District Court, for the Eastern Division of the Eastern Judicial District of Missouri:

The above named plaintiff, Central Transfer Company, believing itself aggrieved by the decree made and entered in

this cause, on the 19th day of October, 1931, denying plaintiff's application for a perpetual injunction, and dismissing plaintiff's Bill of Complaint, does hereby appeal from said decree to the Circuit Court of Appeals of the United States, for the Eighth Circuit, for reasons set forth in the Assignment of Errors which is filed herewith, and the plaintiff prays that its appeal may be allowed, and that citation issue as provided by law, and that a transcript of the record, upon which said decree is based, duly adjudicated, may be sent to said Court of Appeals.

GLENDY B. ARNOLD,
Solicitor for Plaintiff.

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60 (Order Allowing Appeal, etc.)

(Filed Nov. 5, 1931.)

To the Honorable Charles B. Davis, Judge of the United States District Court, for the Eastern Division of the Eastern Judicial District of Missouri:

Now on this day comes plaintiff in the above entitled cause, and files and presents to the court its petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, from the decree entered herein, under date of October 19th, 1931, together with its Assignment of Errors on such proposed appeal; upon consideration whereof, the court doth order that an appeal be, and it is here allowed said plaintiffs as prayed for, upon its giving bond for costs in the penal sum of $500.00 whereupon plaintiff presents to the court such cost bond on appeal in the sum of $500.00 which bond is duly approved and filed.

CHARLES B. DAVIS,
Judge.

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61 Assignment of Errors.

(Filed Nov. 5, 1931.)

To the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri:

Now comes the plaintiff in the above entitled cause, and respectfully complains that the decree entered in said cause, on the 19th day of October, 1931, is erroneous and prejudicial to the plaintiff in the following particulars:

1. The court erred in denying plaintiff the relief prayed for, and in entering its decree dismissing plaintiff's Bill of Complaint.

2. The court erred in not making complete findings of fact, material to the issues, as required by Rule 70½ of the Rules governing the trial.

3. The court erred in refusing to adopt as its findings of fact in this cause the "Findings of Fact" submitted to it by the plaintiff, or so much of said findings of fact as is necessary to sustain plaintiff's Bill of Complaint.

4. The court erred in each of its conclusions of law upon which the decree is based.

5. The court erred in holding that there is involved in this case the application of rates of the carriers.

62 6. The court erred in holding that under the proviso to Section 16 of the Clayton Act (U. S. C. A. Title 15, Sec. 26) plaintiff could not maintain its Bill and that only the United States could maintain such bill against the carrier defendants.

7. The court erred in holding that the subject-matter of plaintiff's Bill is within the jurisdiction of the Interstate Commerce Commission.

8. The court erred in holding that an agreement among the carriers by railroad to employ one transfer company in the collection, distribution and interchange of less than carload freight at St. Louis and East St. Louis is not in violation of the Sherman Anti-Trust Act.

9. The court erred in holding that the combination and contract of the defendants to discontinue their individual employment of plaintiff and for the employment of the Columbia Terminals Company to handle their railroad freight between off-track and on-track stations at St. Louis and East St. Louis, and between on-track stations at such points, does not contravene or violate Sections 1, 2 or either of them of the Sherman Anti-Trust Act.

10. The court erred in holding as a matter of law that the plaintiff is not engaged in interstate commerce in the transportation of less than carload freight for the carrier defendants.

11. The court erred in holding that it is without authority to enjoin the application of the tariffs of the carrier defendants on file with the Commission and that it is also without authority to, by a mandatory injunction, require a carrier by railroad to file a tariff with the Commission.

12. The court erred in not holding as a matter of law that the combination formed by the defendants for the purpose of entering into the contract between the Terminal Railroad Association and the Columbia Terminals Company and the filing of tariffs pursuant thereto, was a violation of the Sherman Anti-Trust Act.

Wherefore, plaintiff prays that said decree be reversed, and that said Court of Appeals cause such final decree to be entered as the pleadings, evidence and the law show the plaintiff to be entitled to, and for such other and further relief as the plaintiff may be entitled to on the record, and that this appeal be advanced for hearing by the honorable Court of Appeals in accordance with the provisions of the Judicial Code therein provided.

GLENDY B. ARNOLD,
Solicitor for Plaintiff.

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63 (Stipulation as to Contents of Transcript.)

(Filed Nov. 24, 1931.)

To the Honorable District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri:

It is stipulated and agreed by and between counsel for the respective parties in the above entitled cause that the transcript of record on plaintiff's appeal to the Circuit Court of Appeals of the United States, for the Eighth Circuit, shall consist of the following, viz:

1. Bill of Complaint.

2. Answer of the defendants, omitting exhibits attached thereto.

3. Temporary restraining order granted by Judge Otis.

4. Stipulation of the parties agreeing that the cause be heard on the merits.

5. Attach defendants' Exhibits Nos. 3 and 4 to the transcript.

6. Narrative Statement of evidence admitted and excluded, objections of counsel and court's rulings thereon, at the trial of this cause, on the merits, as agreed to by counsel and approved by the court.

7. Proposed Findings of Fact submitted by plaintiff at request of and refused by the court.

8. Court's Findings of Fact and Conclusions of Law.

9. Final Decree.

10. Petition for and order allowing appeal.

11. Assignment of errors.

64 12. Citation.

13. Praecipe and stipulation for making up record on appeal.

14. Clerk's certificate.

GLENDY B. ARNOLD,
Solicitor for Plaintiff.

H. H. LARIMORE,
C. S. BURG,
Solicitors for Defendants.

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65 Narrative Statement of Evidence, Admitted and Excluded, Objections of Counsel and Court's Rulings Thereon, at the Trial of this Cause, on the Merits, as Agreed to by Counsel and Approved by the Court.

(Filed Nov. 24, 1931.)

This cause came on for hearing on plaintiff's application for a temporary injunction, during the September Term, A. D. 1931, by the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, in Division No. 2, on the 21st day of September, A. D. 1931, before Honorable Charles B. Davis, District Judge.

Appearances.

All parties appeared and were represented by counsel.

The plaintiff dismissed its bill as to defendant, New York, Chicago and St. Louis Railroad Company.

Stipulation

Filed September 21, 1931.

The following stipulation was duly signed by counsel for plaintiff and defendants, and filed of record in this cause.

"This cause coming on to be heard on this 21st day of September, 1931, on Plaintiff's motion for a preliminary injunction, it is hereby stipulated and agreed by and between

the parties hereto that this cause may be submitted to and tried by the Court on the merits."

66 Evidence.

Plaintiff's Exhibit No. 1.

Plaintiff offered, and this exhibit was admitted in evidence as a true copy of the minutes of a meeting of traffic representatives of all of the railroad and railway companies, and the Chicago and Alton, Chicago, Peoria and St. Louis, and Toledo, St. Louis and Western Railroad Companies, held in the directors' room of the Merchants Exchange, in the City of St. Louis, Missouri, on March 27, 1923, at which was considered and voted upon, by said representatives of said defendants, the following proposal, the consideration and adoption of which had been recommended by a special committee appointed to investigate the same, viz:

"6. Discontinuance by Railroads of allowances, per tariff, to several transfer companies and contracting with only one company".

Said minutes contain the following matter, viz:

"Recommendation No. 6—It was evident that this is the most important one of the recommendations made by the committee. As soon as read by the Chairman two of the prominent lines gave notice that they were not in favor of recognizing but one transfer company. There was considerable discussion on the question and it was suggested that a vote be taken so as to ascertain the feeling which existed as to the adoption of the recommendation. The vote was then taken with the following results: In favor, 3; Not in favor, 11; Not decided, 2; Vote withheld, 1; Not represented, 2. This vote showed that the traffic representatives are about as far from agreeing on any concerted action on this important and urgent question as they were several years ago and both Mr. Sudborough and Mr. Hart explained very fully what a task it was in gathering data, etc. etc. and arriving at their conclusions and that they were firmly of the belief that their conclusions were a solution to remedy a situation which is admittedly bad and costs the railroads thousands of dollars each year. It was pointed out that under the present system other transfer companies were in the field for recognition and it was their thought that in confining it to one company that the desired results could be obtained. It was pointed out by others who were opposed to the one transfer company feature, that to be at the mercy of one company would slow down the movement of business

and furthermore, that competition was very important, that already some transfer company had agreed to reduce their rates on a certain class of business.

"Mr. Watson of the Cotton Belt remarked that it was very clear that nothing could be accomplished further in reference to this matter and commended the special committee for the work they have done and a vote of thanks was voted to such committee, whereupon Mr. Watson offered the following resolution, which was carried:

"Recommended that the meeting adjourn and convene
67 April 24th and that representatives be prepared to express their definite views as to what correction they consider should be made in the present method of handling St. Louis and East St. Louis L. C. L. Traffic.

Plaintiff's Exhibit No. 2.

This exhibit was offered by plaintiff and admitted in evidence as minutes of the proceedings of a meeting held in the office of Mr. J. R. Koontz, Vice-President of the St. Louis-San Francisco Railway Company, May 28, 1926, at 10:00 a. m., in the City of St. Louis, Missouri. These minutes show that this meeting was composed of executives and traffic officials of all of the railroad and railway defendants. It was called "to further consider the wagon transfer situation in the St. Louis-East St. Louis district." Said minutes contain the following matter, viz:

"Proceedings of Meeting
Held in the Office of Mr. J. R. Koontz, Vice-Pres., Frisco Railroad, Friday, May 28, 1926, at 10:00 A. M., to Further Consider the Wagon Transfer Situation in the St. Louis-East St. Louis, District.

"For the benefit of those present who were not members of the special committee handling this subject, the chairman outlined briefly the work that had been done by the special committee under the instructions of the executives of June 8, 1925.

"Pursuant to these instructions the committee has decided to take over and operate under contract certain off-track stations of the transfer company; to give the shipping public the same service at such off-track stations as is given at the on-track stations of the carriers, and the carriers to assume the responsibility for movement of traffic from and to the off-track stations.

"It has also been decided that on St. Louis traffic the Missouri Pacific and Frisco Railroads will discontinue making allowances to the transfer companies and that other westside lines having on-track stations in St. Louis, including the Cotton Belt, Wabash, and C. & E. I. Railroads, will make allowances on out-bound traffic from off-track stations located at—

11th and Spruce

Broadway and Chouteau

Broadway and Spruce

"No allowance to be made on inbound traffic.

"The eastern and southern lines, whose stations are located in East St. Louis, will make allowances to the transfer company on outbound traffic from off-track stations located at—

11th and Spruce

Broadway and Chouteau

Broadway and Spruce

and Carr

68 and on inbound traffic to—

6th and Spruce

Broadway and Carr

4th and Valentine

"Westside lines not having freight houses in East St. Louis will make allowances to and from one off-track station located in East St. Louis.

"It has been agreed that all the interested lines will contract with one transfer company for handling traffic between on-track stations of the carriers and off-track stations of the transfer company as well as for the handling of all interchange traffic now handled by the transfer companies.

"It was further agreed that as soon as the new plan is put into operation, an immediate reduction of 10¢ per ton will be made in the present allowances with the exception of the allowances for direct delivery which have been fixed at 2¢ on fruits and vegetables and 1¢ on all other carload traffic and 2¢ per 100 pounds on less carload traffic.

"After discussing the proposed plan from its various angles, it was

"Recommended, That the entire proposition as outlined by the Committee be approved.

"Upon vote being taken, all lines present voted in the affirmative with the exception of the C. & A., C. & E. I. and N. Y. C. & St. L.

"Mr. Watson of the Cotton Belt had prepared a tentative contract. It was finally agreed that the Chairman would appoint a legal committee of six—two attorneys representing eastside lines, two westside lines, and two southern lines—to go over the contract as submitted by the Cotton Belt Railroad and reach a conclusion as to whether or not said contract covers the situation.

"It was also agreed that Messrs. Coverston, Saur and Calvin would meet with the legal committee for the purpose of offering any suggestions they may have concerning the subject.

"Mr. Watson of the Cotton Belt also had prepared a form of joint tariff to be filed for account of all lines. It was finally agreed that the chairman appoint a committee of six, two from the eastside lines, two from the southern lines, and two from the western lines, to meet with Mr. Watson and go over the tariff already prepared and in addition check the tariffs of the individual lines with a view of seeing to it that all provisions in the tariffs covering allowances to transfer companies are canceled simultaneously with the effective date of the proposed joint tariff.

"Freight Traffic Manager Ramback of the Missouri Pacific made a statement to the effect certain changes would be necessary in the freight houses of his company before this arrangement could be made effective, and it probably would be January 1, 1927, before such change will be made. It was therefore agreed that a tariff will be filed to become effective not later than January 1, 1927.

"It was suggested that the C. & A., C. & E. I. and N. Y. C. & St. L. advise the chairman of the committee, if possi-
69 ble, within fifteen days as to the proposed action of those lines."

Plaintiff's Exhibits Nos. 3, 4 and 5

These exhibits were offered in evidence by the plaintiff. They are three forms of contracts prepared by the "Legal Committee of Six", representing the railroad defendants, re-

ferred to in plaintiff's Exhibit No. 2. Each of these forms of contract is entitled

"Contract
Between
The ..... Rail ..... Co.
and
Columbia Terminals Co."

and at the end each contains appropriate blank spaces for the signatures of the parties.

In each of said forms of contract the Columbia Terminals Company proposes to "provide and maintain at its sole cost and expense, but to the satisfaction of the Railroad (signing said contract) adequate station facilities herein termed 'off-track freight stations' ", which are designated by location in each of said forms of contract. The stations to be maintained in East St. Louis, Illinois, are located at 700 Broadway Street, in said city, and at the Stockyards. Those to be maintained in St. Louis are located at 11th and Spruce Streets, Broadway and Spruce Streets, Broadway and Chouteau Avenue, Second and Carr Streets, Sixth and Spruce Streets, Broadway and Carr Streets, and Fourth and Valentine Streets.

Said Exhibit No. 3 contains, among others, the following provisions:

"The Railroad Covenants and Agrees:

"27. To designate the freight stations specified in paragraphs numbers 1 and 2 of this agreement as the only 'off-track' freight stations of the Railroad in the city of St. Louis for the handling of inbound and outbound less than carload freight for account of said Railroad, except as modified by Article 23.

"28. To deliver to the Contractor at the 'on-line' freight station of the Railroad located in East St. Louis, all such less than carload freight as the Railroad may desire handled other than in railroad freight cars between the 'on-line' freight station of the Railroad located in East St. Louis and the 'on-line' freight stations of the various railroads located in East St. Louis and St. Louis."

Said Exhibit No. 4 contains, among others, the following provisions:

"The Railroad Covenants and Agrees:

70 "27. To designate the freight stations specified in paragraphs numbers 1 and 2 of this agreement as the

only 'off-track' freight stations of the Railroad in the cities of St. Louis and East St. Louis for the handling of inbound and outbound less than carload freight for account of said Railroad, except as modified by Article 23.

"28. To deliver to the Contractor at the 'on-line' freight station of the Railroad located in St. Louis, all such less than carload freight as the Railroad may desire handled other than in railroad freight cars between the 'on-line' freight station of the Railroad located in St. Louis and the 'on-line' freight stations of the various railroads located in St. Louis and East St. Louis."

Said Exhibit No. 5 contains, among others, the following provisions:

"The Railroad Covenants and Agrees:

"27. To designate the freight stations specified in paragraphs numbers 1 and 2 of this agreement as the only 'off-track' freight stations of the Railroad in the city of East St. Louis for the handling of inbound and outbound less than carload freight for account of said Railroad, except as modified by Article 23.

"28. To deliver to the Contractor at the 'on-line' freight station of the Railroad located in St. Louis, all such less than carload freight as the Railroad may desire handled other than in railroad freight cars between the 'on-line' freight station of the Railroad located in St. Louis and the 'on-line' freight stations of the various railroads located in St. Louis and East St. Louis."

"Article 23", referred to in paragraph 27 of said exhibits 3, 4 and 5, reads as follows:

"23. To consolidate, discontinue or abandon, within a reasonable time, upon the written request of the Committee of railroad representatives, appointed as provided for herein, any of the station facilities covered by the terms of this agreement. If such facilities are consolidated, discontinued or abandoned, due consideration shall be given to adjusting the accounts so that they shall reflect the proper debits or credits".

In each of said forms of contract, contained in said Exhibits 3, 4 and 5, the word "Railroad" used therein refers to the railroad or railway company signing said contract, and the word "contractor" refers to the Columbia Terminals Company, the other party to said forms of contract.

Plaintiff's Exhibit No. 6.

Exhibit No. 6 was offered by the plaintiff and admitted in evidence. It is a copy of a joint tariff filed by the railroad defendants with the Interstate Commerce Commission May 21, 1927, to become effective July 1, 1927. In this tariff each of the railroad and railway defendants designate certain off-track stations as the only off-track stations in St. Louis
71 and East St. Louis where they will receive and deliver freight and to and from which their rates will apply. Said off-track stations as shown in said tariff are places of business of the Columbia Terminals Company.

Plaintiff's Exhibits 7, 8 and 9

Plaintiff offered and these exhibits were admitted in evidence. They are memoranda of proceedings at conferences of executive and traffic officials of the railroad defendants, held in Room 300, Union Station, St. Louis, Mo., on February 9th, March 9th and May 28th, 1931. The subject-matter discussed at these conferences is stated in the memoranda to be the "Transfer Situation in the St. Louis-East St. Louis District" and 'Drayage in the St. Louis-East St. Louis District". At the meeting of the executives of said defendants, on March 9, 1931, a resolution was unanimously adopted, appointing and authorizing Henry Miller, President of the Terminal Railroad Association, as the representative of the railroad defendants, "to handle the drayage matter to a conclusion and with power to act".

The memorandum of the meeting of May 28th, 1931, shows that pursuant to the authority given Mr. Miller, he negotiated and executed with defendant, Columbia Terminals Company, the contract contained in plaintiff's Exhibit 10, a copy of which is contained in plaintiff's Exhibit 10 and defendant's Exhibit B, attached to its answer. This contract, after full discussion, was approved by a majority vote of the executives present and representing the railroad defendants.

Plaintiff's Exhibit No. 10.

This exhibit was offered by plaintiff and admitted in evidence. It is a copy of the contract between the Terminal Railroad Association and the Columbia Terminals Company, referred to in plaintiff's bill of complaint. A like copy is re-

ferred to in defendant's answer as Exhibit B. The contract is dated and was signed by the parties on the first day of June, 1931. Those parts of this exhibit material to the issues raised by this appeal are as follows:

"This Agreement, made and entered into this First day of June, A. D. 1931, between the Terminal Railroad Association of St. Louis, a railroad corporation of the State of Missouri, hereinafter called the "Association", and the Columbia Terminals Company, a corporation of the State of Missouri, hereinafter called the "Contractor"

"Whereas, the Association, its proprietary lines, tenants and licensees, hereinafter called the "Railroads", desire to maintain in St. Louis, Missouri and East St. Louis, Ill-
72 inois a certain number of 'off-track' stations to afford more efficient service to the public and propose to designate such stations, when selected, as railroad stations to and from which freight may be delivered and received and at or through which bills of lading and other documents may be issued by the contractor as agent of the Railroads, in the same manner and with the same expedition as at their 'on-track' stations and

"Whereas, the Railroads have selected the following 'off-track' stations indicated by the locations described below:

"Eleventh and Spruce Streets	St. Louis, Missouri
Broadway & Spruce Streets	St. Louis, Missouri
Broadway & Chouteau Avenue	St. Louis, Missouri
Second & Carr Streets	St. Louis, Missouri
Sixth & Spruce Streets	St. Louis, Missouri
Broadway & Carr Streets	St. Louis, Missouri
Fourth & Valentine Streets	St. Louis, Missouri
700 Broadway	East St. Louis, Illinois
Stock Yards	East St. Louis, Illinois

"The aforesaid service is to be performed as provided in the tariffs of the Railroads.

"Definition of Terms Used in this Contract.

"The term 'on-track' freight stations as used in this contract shall be understood to mean established freight stations, either in St. Louis or East St. Louis, located on the railroad tracks of one or more Railroad Companies and accessible by railroad freight cars.

"The term 'off-track' freight stations as used in this contract shall be understood to mean stations and warehouses

suitable for receiving and protecting freight, but which are not reached by the tracks of any Railroad Company, but can be reached only by vehicles suitable for operation on the streets of a city, and operated by the Contractor for and on behalf of the Railroads.

"The term 'interchange service' as used in this contract shall be understood to mean the interchange of less than carload freight between the 'on-track' stations of any two railroads located in the St. Louis-East St. Louis switching districts.

"Whereas, the Contractor desires to handle such less than carload freight and to furnish the designated 'off-track' freight stations, forces and equipment of whatever kind may be necessary to carry out this agreement.

"Whereas, it is hereby declared to be the purpose of the parties to this agreement to carry out in good faith the above plan, in accordance with the following terms and conditions.

"Now, therefore, it is agreed by and between the parties hereto as follows:

"The Contractor Covenants and Agrees:

"Section 1. Effective June 1st, 1931, to provide and maintain at its sole cost and expense, but to the satisfaction of the Railroads, adequate station facilities herein termed
73 'off-track' freight stations for handling outbound less than carload freight, as provided for herein, and which shall be located as follows, in accordance with the selection and designation by the Association.

"Eleventh & Spruce Streets	St. Louis, Missouri
Broadway & Spruce Streets	St. Louis, Missouri
Broadway & Chouteau Avenue	St. Louis, Missouri
Second & Carr Streets	St. Louis, Missouri
700 Broadway	East St. Louis, Ill.
Stock Yards	East St. Louis, Ill.

"Section 2. To provide and maintain, at its sole cost and expense, but to the satisfaction of the Railroads, adequate freight station facilities herein termed 'off-track' freight stations for handling inbound less than carload freight as provided for herein, and which shall be located as follows, in accordance with the selection and designation by the Association:

"Sixth & Spruce Streets	St. Louis, Missouri
Broadway & Carr Streets	St. Louis, Missouri
Fourth & Valentine Streets	St. Louis, Missouri
700 Broadway	East St. Louis, Illinois

"Section 21. To consolidate, discontinue or abandon, within 90 days, upon the written consent of the Association, any of the station facilities covered by the terms of this agreement.

"Section 22. The Contractor shall, at all times, furnish adequate facilities, servants and employes to enable the Railroads to fully discharge their duties and obligations as common carriers with reference to the transportation of freight involved in this agreement. And should the facilities used by the Contractor prove, at any time in the opinion of the Association, to be inadequate for the performance of such service, the Contractor will provide such additional facilities as may, in the opinion of the Association, be necessary for the Contractor, to fully discharge its duties and obligations under this contract.

"The Railroads Covenant and Agree

"Section 25. To designate the freight stations specified in Sections No. 1 and 2 of this agreement as to the only 'off-track' freight stations of the Railroads in the City of St. Louis and the City of East St. Louis for the handling of inbound and outbound less than carload freight for account of the Railroads except as modified by Sections 21 and 22, herein.

"Section 26. To deliver to the Contractor at the 'on-track' freight stations of the Railroads located at St. Louis, Missouri and East St. Louis, Illinois all such less than carload freight as the Railroads may desire handled other than in railroad freight cars, between and amongst the 'on-track' freight stations of the Railroads located in St. Louis, Missouri and East St. Louis, Illinois.

"Section 27. To file the necessary amended tariffs with the Interstate Commerce Commission, the Public Service Commission of Missouri and the Illinois Commerce Commission, effective June 1st, 1931, and to make weekly settlements for the services described herein at the agreed charges, as follows:

(a) From 'on-track' freight stations of the Railroads in St. Louis, Missouri to the said 'off-track' freight sta-
74 tions in East St. Louis, Illinois at the rate of 260 cents per ton.

(b) From the said 'off-track' freight stations in East St. Louis, Illinois to the 'on-track' stations of the Railroads in St. Louis, Missouri at the rate of 204 cents per ton.

(c) From 'on-track' stations of the Railroads at East St. Louis to said 'off-track' stations in St. Louis, Missouri, at the rate of 260 cents per ton.

(d) From the said 'off-track' freight stations in St. Louis Missouri to the 'on-track' freight stations of the Railroads in East St. Louis, Illinois at the rate of 204 cents per ton.

(e) From the said 'off-track' freight stations in St. Louis, Missouri to the 'on-track' freight stations of the Railroads in St. Louis, Missouri, at the rate of 195 cents per ton.

Note: For the purpose of expediting the forwarding of freight handled from 'off-track' stations in St. Louis, the following districts are established in St. Louis:

North Freight House District (North of Market Street)

South Freight House District (South of Market Street)

The rate herein provided applies only to traffic handled from 'off-track' stations in one district to 'on-track' stations in another district, and no allowance will be made for handling traffic from 'off-track' stations to 'on-track' stations both within the same district.

For example, the Contractor may receive freight at 'off-track' stations in the South district for Railroads having 'on-track' stations in the North District only.

Also, the Contractor may receive freight at 'off-track' stations in the North district for Railroads having 'on-track' stations in the South district only.

(f) Between 'on-track' freight stations of the Railroads located in St. Louis, Missouri, at the rate of 161 cents per ton.

(g) Between 'on-track' freight stations of the Railroads located in East St. Louis, Illinois, at the rate of 152 cents per ton.

(h) Between 'on-track' freight stations in St. Louis, Missouri, and 'on-track' freight stations in East St. Louis, Illinois at the rate of 162 cents per ton.

"Section 29. If this agreement is not required to be modified or abrogated at any time by an order of a federal or state commission having jurisdiction of the subject matter herein covered, or by a final decree of a court having jurisdiction of the subject matter herein covered, it shall be in effect and binding for a period of one year from the date hereof and

continue thereafter until either party gives six months
75 notice in writing of its desire to discontinue same."

Plaintiff's Exhibit 11.

This exhibit was offered by the plaintiff and admitted in evidence. It is a letter, dated St. Louis, Mo., July 17, 1925, from L. W. Childress, President, of defendant, Columbia Terminals Company, to Jno. W. Clark, Assistant Traffic Manager, of defendant, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, at St. Louis. Among others, the letter contains the following statement, viz:

"Dear Mr. Clark:

"You have asked me to state the terms on which this company will sell, or lease, to the railroads the following properties. I beg to submit a description of the properties and the prices at which this company will sell them to the railroads. The prices indicated are based upon an appraisal of the properties made in 1918 by the American Appraisal Co., and to the appraised value 25 per cent has been added.

"Eleventh and Spruce Streets—152 ft. x 400 ft. improved with a one-story brick and concrete building especially designed for the receipt of outbound freight. Price $331,865.00

"Broadway and Spruce (entire city bock), 226 ft. x 183 ft., improved with substantial four-story slow combustion brick building. Ground floor used for both inbound and outbound freight. Upper floors used as a public storage warehouse. Price.. $894,221.00

"Broadway and Chouteau Ave. (entire city block), 125 ft. x 271 ft., improved with a one-story brick building, especially designed for the receipt of outbound freight. Price..... $173,015.00

"Second and Carr Streets (entire city block), 121 ft. x 395 ft., improved with a one-story brick building, especially designed for the receipt of outbound freight—14 ft. 6 in. x 121 ft. of this property is not owned by us. Price..... $328,480.00

"Sixth and Spruce Streets (one-half city block), 228 ft. x 127 ft., improved with a one-story brick and concrete building especially designed for the

accommodation of inbound freight. This property is leased by us. We would be agreeable to assigning our lease to the railroads.

"Broadway and Carr Streets, 130 ft. x 120
76 ft., improved with a one-story brick building, especially designed for the accommodation of inbound freight. Price $117,000.00

"Broadway and C Streets, East St. Louis—One-story frame building on leased ground, used for both inbound and outbound freight. Price of improvements ..... $ 2,500.00

"If the railroads desire an option for a period of two years from August 1, 1925, on the above described properties, at the prices indicated, or upon the basis of value to be determined by an appraisal, this company is willing to extend to the railroads an option of this character.

"In the event that the railroads in the St. Louis District, as shown on statement "A" attached, designate the stations also shown on statement "A", as the only 'off-line' stations they will use for receipt or delivery of freight, and will contract with the Columbia Terminals Company for all truck service between these stations and their main stations; also for all less carload interchange traffic between railroad stations in St. Louis; between stations in East St. Louis; and between stations in East St. Louis and St. Louis, the Columbia Terminals Company is willing to enter into a contract with these railroads covered by a bond, if desired, for performance as follows:

"(a) Maintain adequate trucking equipment for the movement of less carload through traffic between the station, or stations of the railroads and the stations of its connections in St. Louis and East St. Louis and promptly move such traffic.

"(b) Provide and maintain ample and adequate depot facilities for the accommodation and economical handling of traffic originating with the shippers of St. Louis and East St. Louis destined to points reached by the railroads.

"(c) Provide and maintain ample and adequate station facilities for the accommodation and economical handling of inbound traffic which may be offered by the railroads at their stations located in St. Louis or East St. Louis, consigned to consignees located in St. Louis or East St. Louis.

"(d) Provide and maintain an adequate clerical force to keep a proper and accurate account of its transactions with the railroads.

"It is understood under this plan by which the railroads will designate these stations as their stations, that the stations are to become public stations and any individual, firm or trucking company is free to deliver freight at the outbound stations and to receive freight at the inbound stations in the same manner as they do at any of the main railroad stations on track in the City of St. Louis, and this company will not discriminate as between its own equipment as a trucking company and any other trucking firm or individual.

"If the carriers make a contract, or contracts, of this character this company will:

"1. Upon the effective date of the arrangement, reduce the rates for depot and transfer service on interchange ten cents per ton on less carload traffic. This reduction, on the basis of tonnage figures compiled by the railroad Committee, would amount to approximately $110,000.00 per annum.

"2. Keep our books and accounts on service performed under this contract, or contracts, so as to accurately show at all times the exact operation, and in a manner that will have the approval of the Railroad Committee, and be subject to examination by that Committee semi-annually, or oftener if desired, and if this examination shows further economies result from this arrangement, the charges will be promptly readjusted downward so that the railroads will have the full benefit of the arrangement.

"Should the railroads desire to make the reduction in rates equivalent to 10 cents per ton for all service, in some other manner than a flat reduction of 10 cents per ton on all less carload traffic—for illustration, by a greater
77 reduction in the charge for tranfer between stations in St. Louis and East St. Louis, and a less reduction in the charge for depot service, this company is willing that the reduction outlined above should be applied in that manner.

Yours very truly,

(Signed) L. W. CHILDRESS."

Plaintiff's Exhibit No. 12.

This exhibit was offered by plaintiff and admitted in evidence. It is a certified copy of an order of the Interstate Commerce Commission, dated at Washington, D. C., 7-25-31, granting the application of the railroad defendants, dated July 21, 1931, to file the tariffs required by the provisions of paragraph 27 of the contract, shown by plaintiff's Exhibit No. 10, and postponing the effective date of said tariffs until November 1st, 1931.

Plaintiff's Exhibit No. 14.

This exhibit was offered by the plaintiff and admitted in evidence, to comply with a ruling of the court made upon the objections of the defendants. It is a transcript of the oral testimony given before Harry C. Ames, an Examiner for the Interstate Commerce Commission, at a hearing at the Chase Hotel, in St. Louis, November 1 to 16, 1927, inclusive, in proceedings then pending before said Commission and entitled "Transfer of Freight Within St. Louis and East St. Louis by Dray and Truck for and on Behalf of Railroads", No. 19594, and in Investigation and Suspension Docket No. 2934, and First Supplement. The character of the proceedings is described in the Commission's report, (155 I. C. C., 129) referred to in defendants' answer, as follows:

"No. 19594 is an investigation on our own motion in respect of the collection, receipt, delivery, transfer or other handling of freight in, within, and between the switching districts of East St. Louis, Ill., and St. Louis, Mo., by means of motor trucks, drays or other vehicles operated on and over the public highways. I. S. No. 2934 concerns and the lawfulness and the propriety of the practices provided for in tariffs filed by the railroads serving East St. Louis and St. Louis with their own rails, or holding themselves out to serve those communities through their published tariffs. In the suspended tariffs and in contracts to be filed with them it is proposed to effect changes in allowances paid to transfer companies for the handling of freight for and on behalf of the carriers, in the number of off-track stations to be maintained in East St. Louis and St. Louis, and to restrict railroad hauling to one transfer company".

A large number of civic, business organizations and transfer companies entered their appearances to the proceedings

as protestants. Among them were the St. Louis Chamber of Commerce and the Central Transfer Company. All of the defendants were made respondents and entered their
78 appearances and were represented by counsel.

Plaintiff read in evidence from said Exhibit 14 the testimony of William C. Maxwell, John W. Clark, L. W. Childress and Joseph Englander, herein set forth.

WILLIAM C. MAXWELL was called as a witness by the respondents, and having been first duly sworn by the Examiner, testified, in part, as follows:

My name is William C. Maxwell. I am Vice-President in charge of traffic of the Wabash Railway Company, with headquarters in St. Louis, Missouri. For twenty-five years I was with the Chicago, Burlington and Quincy Railroad Company, having entered the local freight offices as a messenger and filled about every position in the local freight office. I came to the Wabash in 1905 as Assistant General Traffic Manager, and was later made Traffic Manager. In 1915 I was made Vice-President in charge of traffic, which position I have occupied since, except during the period of federal control, when I was General Traffic Manager of the Wabash. I appear in this case on behalf of the railroads of St. Louis, except the Chicago and Alton, and on behalf of the Wabash Railway Company in particular. I am a member of the special committee appointed by the Presidents to investigate and bring about an improvement in the drayage situation in St. Louis. Since the tariff was filed the Fidelity Transfer Company sold its equipment and main outbound stations to the Columbia Terminals Company. There was talk of monopoly in connection with the drayage proposals. This charge is entirely fictitious as the Fidelity Transfer Company did not engage in the general business. Their business consisted entirely of furnishing depots and receiving and delivering freight at these depots for the railroads—just their agents, nobody else's—and hauling it between these depots and the on-track stations. Now that the Fidelity Transfer Company has been absorbed it leaves the Central Transfer Company, which is a small company, hauling only about 8½% of the total tonnage. As all the railroads serving the St. Louis district, except the Chicago and Alton, after exhaustive investigation over a period of years and consideration of every conceivable plan and every suggestion, including the demand of the Chamber of Commerce for better service, were able to agree and did agree unanimously upon

the best plan which is presented in the tariffs under suspension, they should be permitted to put the arrangement into effect. I regard the settlement of the one-transfer plan agreed upon as perfectly good for 25 years. All of the railroads participating in the joint tariff on file propose
79 to sign one or the other contracts proposed in Exhibits 3, 4 and 5. (These exhibits are parts of this record and are marked Plaintiff's Exhibits Nos. 3, 4 and 5). The railroads have been trying to cure this drayage situation for years, and finally reached some place as a starting point on curing this awful situation here, and serving the public better than they are serving them today. It is stated that all of the railroads will sign one or the other of these proposed contracts. We have tentatively agreed we will go into a contract of that sort, including Mr. Bierd, and he is backed up, and some of the others may be before we get through. At the time the railroads agreed on these contracts there were three transfer companies engaged in this business. They were the Columbia, the Fidelity and the Central Transfer Companies. When the railroads agreed on these contracts the Fidelity Transfer Company was faced with the good sense of the railroads in trying to correct and put this arrangement into effect. They propose here if the Fidelity had not sold out and this arrangement went into effect, none of its off-track stations would be used, and none of the off-track stations of the Central Transfer Company as they now exist would be used. All of the St. Louis railroads are in that tariff except the Chicago and Alton. The Central Transfer Company, the Columbia Transfer Company and the Fidelity Transfer Company were engaged as agents for the railroads, their depots used to transfer freight between those depots and the on-track stations of the railroads, and naturally we know if this plan goes through those companies would not be used if this plan becomes effective. They are simply our agents and I said we had a right to select our own agents and use our own facilities. The people over there (referring to the shipping interests of East St. Louis), in a general way prefer the McMahon station (in East St. Louis), and Mr. McLean, President of the Chamber of Commerce and Mr. Rogers, called on me one day and talked over the situation very frankly, and I suggested to Mr. Rogers that I make an appointment with Mr. Childress (President of the Columbia Terminals Company) and see if they could not get together. and they succeeded in doing so and entering into some arrangement within a short time, so they were able to dispense

with one station over there, and that has the approval of the people there, as I understand. Some of the shippers
80 in St. Louis made it very clear to the Committee, including myself and Mr. Clark that they wanted to continue to use the facilities of the Fidelity and the Central Transfer Companies. If this arrangement goes through we do not propose to recognize the depots of the Central Transfer Company. The Columbia Terminals Company purchased the Fidelity Transfer Company and paid $250,000.00 for it, and my connection with it was this: I understood that the two companies had been negotiating indirectly for the sale of property, and finally a Mr. Thole, I believe his name is, a young man, came to see me. He wanted to know about the situation, whether we thought we were going ahead, and whether there was not some way for these people to get together and talk business about it. I said I can arrange an appointment for you with Mr. Childress. Mr. Thole talked very frankly and laid all the cards on the table, and I told him to see if he could not make some headway on it. Later on, he asked if he could bring Mr. Con P. Curran in to see me, and he and Senator Hawes came to see me. Judge Arnold has been mixed up in this for Mr. Curran. They had all been going around to see all the railroads, to see whether the railroads were in earnest, about trying to accomplish this plan, and I told them in a decided way that they were determined to go through with it, to try and clear this situation up, and give these people better service and save money themselves. That resulted in some further meetings between different interests. Judge Arnold stated to me that he went to see Mr. McKeen and various others, and I got the impression he was a missionary for Mr. Curran. The Judge tried to convince the railroads, those that he talked to, they were creating a monopoly, the same as he has done today, and this was all illegal and against the Sherman Antitrust Act, and he was advising us as a friend, to stay off of it, and was all friendly and that was about the substance of his visit. Various people tried in every way to see if they could not force the railroads to stop this effort to correct the situation. I believe Mr. Curran was President and main owner of the Fidelity Transfer Company. My participation in these negotiations was to call up Mr. Childress, in the presence of Mr. Curran and Senator Hawes, and I told him these gentlemen were in my office and they wanted to make some other appointment to talk this matter over further. That is the ex-

tent of what I did. I didn't act as any go-between.
81 I understood they got together subsequently. Afterwards I met one of the gentlemen at his request before the thing was finally closed. The object of that meeting was to get my frank and unbiased opinion as to what it might be advisable to do in the interest of Mr. Curran under the conditions as they appeared at that time. I gave the same advice I would give in my own affairs to my own brother. I went to Senator Hawe's house. He wanted to known my opinion about it as a friend, and as a friend of Mr. Curran's. I advised Judge Arnold that the sensible thing for Mr. Curran to do was to get the best possible price he could. I understand that the man who has charge of the contracts (Plaintiff's Exhibits 3, 4 and 5) will immediately send them out and probably call for their execution. The railroads will have to pay the salaries and expenses of the supervisor and his staff, and they could save it a thousand times over, and could have saved it all of these years if they had them, but we had a lot of balky horses we could not do anything with. I don't know why I was selected to arrange the conference between Mr. Con P. Curran and Mr. Childress. They all looked on me as a kind of angel. I arranged the conference because they asked me to do so. I interposed no objection to the sale of the Fidelity Transfer Company to the Columbia Terminals Company because I thought that would go a long way toward solving this problem of getting these people together. It solves the problem by helping to concentrate freight where we can get hold of it, where we can operate with more efficiency and a great deal better than we are today. It looked to me like Mr. Con P. Curran was going to have an idle freight house. He finally appealed to me for my best judgment as to what I thought he should do. I told him if it were my affair I would try and get the best money I could out of it. I thought he would have more money if he disposed of the Fidelity Transfer Company than if he let it stand idle. I understood that the Columbia Terminals Company paid the Fidelity Transfer Company $250,000.00 for its property. Plaintiff's Exhibits 3, 4 and 5 carry out the idea recommended by the Traffic Committee. Those contracts were largely drawn by the Presidents or Vice-
82 Presidents in charge of operation. The railroads do not want any competition in the handling of this less-than-carload freight. It is our affair only. Mr. Curran only acted as agent for us. We did not need three agents. We want one. We feel by getting one and getting our business concentrated we could control it and move it more quickly and

in bigger loads, and cheaper, and make more frequent trips to the various stations, than it is possible with the thing scattered all around. In the early part of 1926 I purchased as an investment 400 shares of no par value stock of the LaPeer Trailer Company at the then book value. I paid $4,800 for it, and submit for inspection the original check for the payment. I received one dividend in 1926 for the year which amounted to a fraction over 7% on the value of the stock. It is my belief that the Columbia Terminals now have all the trailers they will need to care for the traffic after the new arrangements become effective. It is, therefore, difficult to see how the LaPeer Company can profit from the arrangement. I have been in the business for forty years and I think my character speaks for itself. I would not swerve one inch from my duty under any consideration. The Dixon Transfer Company, which does our work at Chicago, uses LaPeer trailers. I do not understand that there is anything at Chicago that is in this case. I had nothing to do with the sale of LaPeer Trailers to the Dixon Transfer Company.

JOHN W. CLARK was called, sworn as a witness by the respondents and testified, in part, as follows:

My name is John W. Clark. I am Assistant Traffic Manager of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, located at St. Louis. I have been with the company for 27 years. I have been very closely associated with the terminal situation in St. Louis for the past seven years. I have been very closely associated with the dray and transfer situation during the same time, having acted as Chairman of the Traffic Committee handling the subject. I am testifying for all of the interested carriers in this case, both east and west side lines, with the exception of the Chicago and Alton Railroad. There was but one general transfer company in St. Louis, the St. Louis Transfer Company
when the Columbia Transfer Company was organized
83 in 1902. The Fidelity Transfer Company was organized in 1904 and the Central Transfer Company in 1915. There was an amalgamation of the Columbia Transfer Company and the St. Louis Transfer Company during the year 1918 and the new company was known as the Columbia Terminals Company. On June 15, 1927 the Fidelity Transfer Company sold its business to the Columbia Terminals Company. During the year 1926 the McMahon Transfer Company was acquired by the Columbia Terminals Com-

pany. One outstanding feature of the proposed arrangement is that the railroads will cease the recognition of several transfer companies for off-track stations and enter into contractual relations with one transfer company only, for the handling of all through and city freight, as agent for the railroads. The statement is frequently made that the carriers are endeavoring to create a drayage monopoly. The carriers deny this. The utilization of transfer companies in the handling of freight in the St. Louis district has existed in substantially the present form since 1906, and undoubtedly a greater volume of traffic is handled in the St. Louis district for the railroads by the transfer companies than in any other point in the United States. Regardless of this fact none of the railroads in the St. Louis district has ever had a contract with any of the transfer companies and neither have the railroads had any insurance protection. Under the proposed plan the railroads are to take over and operate the off-track stations through the Columbia Terminals Company as their agent. The movement of freight is to be confined to one transfer company in one respect only, i. e., between designated off-track stations and the main on-track railroad stations. The McMahon Transfer Company had already been taken over by the Columbia Company. At the time my committee started its investigation there were three transfer companies handling freight between on-track and off-track stations. Today there are two, the Columbia Terminals Company and the Central Transfer Company. The Columbia handles approximately 91½% of the total tonnage, and the Central about 8½%. Those were the figures for the total tonnage in 1926. The Central Transfer Company has two off-track stations. The Columbia Ter-
84 minals Company offered a contract for five years and agreed to make a greater reduction than ten cents a ton. We issued no call for bids to operate these off-track stations. No other company in the city is equipped to handle this traffic but the Columbia Company. I know that of my own knowledge. If this contract is made with the Columbia Company for two years the Fidelity and the Central Transfer Company would have to go out of the business of hauling freight for the railroads. It is pretty hard to get these railroads together on this question. There are two off-track stations now being operated in East St. Louis by the McMahon Transfer Company, which is owned by the Columbia Company, but are still operated under the name of the McMahon Transfer Company. As I remember, the Columbia

Company acquired the McMahon Company in 1926. The proposed contract with the Columbia Terminals Company was first suggested by the Traffic Committee and referred to the executives, where it was approved. It was the opinion of the Traffic Committee that we should have but one transfer company to handle traffic between the off-track stations and the on-track stations of the carriers. We saw no reason why we should maintain three organizations when one would suffice. The one-transfer plan was before the executives of the railroads for probably six months and was finally approved and the Traffic Committee was instructed what to do under date of June 8, 1925. It was necessary for the Traffic Committee to refer the subject to our executives before we could reach a definite conclusion. We referred the matter to the executives for instructions to all of the lines. I requested the assistance of Mr. Wooster, our Vice-President. Mr. Wooster is a member of the Board of the Terminal Railroad Association, and we thought a good way to get the one-transfer plan before the Executive Committee was to refer it to that Board. I remember Mr. Heller was Chairman of the Traffic Committee for a while, which considered this one-transfer plan. I remember one meeting of the committee when only three roads voted in favor of the plan. They were the Pennsylvania, the Big Four and the Baltimore and Ohio. I represented the Big Four. Mr. Sudborough represented the Pennsylvania and Mr. Edward Hart represented
the Baltimore and Ohio. It took some time to convert
85 the other roads. If the plan becomes effective the Central Transfer Company will be out of business so far as employment of the railroads is concerned. If at the end of the four years our arrangements with the Columbia Company turn out to be unsatisfactory we would probably have to establish facilities of our own, we will be able to do that if we are forced to. It is the intention that all of the roads joining in the tariff will sign these contracts. The contracts have been approved by a legal committee and have been submitted to the individual lines. If some of the roads do not sign I suppose we would have a conference and get them to sign.

L. W. CHILDRESS was called by the respondents, sworn by the Examiner and testified in part as follows:

My name is L. W. Childress. I reside at Clayton, Missouri. I am President of the Columbia Terminal Company

since May, 1905. I have been engaged in the drayage, transfer and trucking business since 1893, with the exception of three or four years I was in the railroad business. Mr. Fitzpatrick, former agent of the Pennsylvania Railroad at East St. Louis, is a stockholder in the Columbia Terminals Company. I do not recall the date he purchased his stock but it was about 12 or 15 years ago. I do not know what he paid for it. Mr. Edward J. Hart, of the Baltimore and Ohio Railroad Company owns 100 shares of preferred stock and 40 shares of common stock. Mr. Hart purchased this stock and paid for it exactly the same price I received for stock sold to others. I held Mr. Fitzpatrick's stock in my name but it was transferred to him before he left the Pennsylvania Railroad. It was in my name for several years. He asked me to carry it that way. The dividend checks were made payable to me and I endorsed them and sent them to him. The Columbia Terminals Company paid the Fidelity Transfer Company $250,000 for their business and equipment. The Columbia Terminals Company owns all of the common stock of the McMahon Transfer Company of East St. Louis. It owns half of the preferred stock and Mr. Rogers and his associates own the other half. The Columbia Company paid $125,000.00 for this stock of the McMahon Transfer Company. The
86 purchase was made in the latter part of December, 1926. The Columbia Company bought that stock after we had entered into this tentative arrangement with the railroads. The Fidelity Company was purchased in June, 1927. The Columbia Company has made capital investments of approximately $375,000.00 in the purchase of the Fidelity Transfer Company and the stock in the McMahon Transfer Company. We did that in the hope and in the belief that we were entering into a permanent arrangement with the railroads to handle their off-track station and interchange business. We made that investment because we thought that the increase in the volume of business it would give us would make it profitable. We also thought that it might operate to clear up this situation which has been under discussion here for a number of years. At the time of said investment the Fidelity and Central Transfer Companies were our only competitors, and the Fidelity and Central Transfer Companies were quite active in their opposition to our plan. I think we took a substantial loss on the physical equipment we purchased from the Fidelity Company. Those losses will not change our rates. We charge the carriers for the movement

of traffic. I think our profits in the past and in the future will be sufficient to absorb this loss. Otherwise we would not have gone into it. We engage in hauling traffic for shippers to and from off-track stations. If our contract goes into effect with the railroads, as proposed, all of the business done by the other transfer companies for the railroads will come to our company. It would not have been necessary for us to make the investment in the Fidelity and the McMahon Companies in order to increase the volume of our business. If our contract goes into effect we would have gotten their business anyway. We made the investment in those properties because I thought it would better the position of the railroads, as well as ourselves in giving effect to this plan they have designed. The Columbia Terminals Company paid more for the stock in the McMahon Company and the business and property of the Fidelity Company than I thought it was worth, but not as much as the other fellow thought it was worth. By purchasing the Fidelity Company I thought it would make it less troublesome to adopt this plan
87 with the railroads by reducing the opposition to it, raised by the Fidelity Company and the shippers.

JOSEPH ENGLANDER having been previously sworn was recalled by the respondents, and further testified in part, as follows:

My name is Joseph Englander. I am Vice-President of the Columbia Terminals Company and President of the LaPeer Trailer Corporation. The records of the LaPeer Company show that Edward Hart, Jr., on August 8, 1923, purchased 250 shares of the LaPeer Trailer Corporation, and paid $2,500 for the stock. It is still in his name. The Columbia Terminals Company and a number of its officers and directors own a controlling interest in the LaPeer Trailer Corporation. I have been President of the company less than a year, and succeeded L. W. Childress. The Columbia Company uses only LaPeer trailers. The Dixon Motors Company, a transfer company of Chicago has eight or ten LaPeer trailers. I do not know the exact number.

Direct Examination

By Mr. Arnold:

CHARLES H. DUNCKER a witness of lawful age, being duly produced by plaintiff, sworn and examined, testified as follows:

My name is Charles H. Duncker. I live at 12 Brentmoor Park, St. Louis County. I am President of the Trorlicht-Duncker Carpet Company. I am a stockholder in the Central Transfer Company, since the beginning of the company, about 1909, 1910 or 1911. I am not positive about the date. I have known Mr. Joseph Murphy a good thirty years. I understand he is Vice-President of the Columbia Terminals Company. He is sitting in the courtroom. In the early part of this year I had a conversation with Mr. Murphy in regard to the sale of the Central Transfer Company. He made an engagement with me and said he would like to talk things over with us. I said all right. We had a conversation in our office on Twelfth Street. Mr. Trorlicht was present.

88 Mr. Murphy said to us "You (meaning the Central Transfer Company) are being put out of business". I said "That may be your opinion but from what we have been told, we don't believe it". Afterwards he made an offer about the Columbia Terminals Company purchasing the Central Transfer Company. He said that he thought he could induce Mr. Childress as a matter of kind heart, to help us out on our equipment, taking it for granted we were being put out of business. That was at the first interview we had. We answered him by stating that we would, of course, speak to the other stockholders, as we did not have the full say to give him a full answer one way or the other. We said if we were interested, one way or the other, we would see him further. A month or two later he came in again and stated that Mr. Childress had told him he was a fool for making us such a crazy offer, and started in to talk about it again. Mr. Trorlicht was present during that conversation. Mr. Murphy said that Mr. Childress would be glad to buy us out, get us out of the way, or help us out, as a matter of kindness, by buying the equipment.

Cross-Examination

By Mr. Larimore:

Mr. Murphy attempted to buy the Central plant but I refused to consider his offer. We told him we would let him know if we were interested, but he never heard from us. I refused to consider any sale of our property to Mr. Murphy on the ground that we would continue the business as before.

HENRY A. TRORLICHT a witness of lawful age, being produced by the plaintiff, sworn and examined, testified as follows:

Direct Examination

By Mr. Arnold:

My name is Henry A. Trorlicht. I live at 3234 Oakland, in the City of St. Louis. I am Vice-President of Trorlicht-Duncker Carpet Company. Some time in the early part of this year, probably March, I had a conversation with Mr. Joseph A. Murphy, in our office. The first conversation was by appointment. Mr. Murphy rang up Mr. Duncker and made the appointment with him and I was present
89 when Mr. Murphy came in. Mr. Murphy came in and said that inasmuch as the Central Transfer Company would be out of business very shortly that they would like to take care of the equipment of the company by buying the company out; that they wanted to buy the equipment; they did not want to be mean enough to put anybody out of business. I think the exact words he used were: "We don't like to be on record as having put anybody out of business". He said: "We don't want to be in a position where we are putting anybody out of business, and we would like to buy the equipment". We told him we were merely stockholders in the company and that we would submit his proposition, and if we were interested we would let him know. Five or six weeks later he came in the office again and said that Mr. Childress said "It is a wonder he didn't throw you out, to make such a darned offer to him."

Cross-Examination

By Mr. Larimore:

Mr. Duncker and I were not in a position to sell the Columbia Terminals Company the Central Transfer Company. We would have to submit the proposition to the stockholders. The Central Transfer Company was organized by the stockholders of the Trorlicht-Duncker Carpet Company, and afterwards became a drayage company, hauling L. C. L. freight for the railroads. The owners of the Trorlicht-Duncker Company continued to own the Central Transfer Company for several years. Of the total volume of freight handled by the transfer company only a very small proportion was hauled for the Trorlicht-Duncker Company.

Redirect Examination

By Mr. Arnold:

While we were the stockholders of the Central Transfer Company it was placed under a different management from the Trorlicht-Duncker Company. We started out as a small company and our business has grown to a very great extent.

I get from the reports that we serve all the railroads in this case.

Recross Examination

By Mr. Larimore:

The offers made to us by the Columbia Terminals Com-
90 pany were not seriously considered because they were too ridiculous. We did not quite agree with Mr. Murphy that we were going to be put out of business soon.

JOSEPH B. MORRILL, a witness of lawful age, produced by the plaintiff and having been previously sworn, and being recalled, testified as follows:

Direct Examination

By Mr. Arnold:

(Note: This witness had previously stated that his name was Joseph B. Morrill, and that he was Vice-President and General Manager of the plaintiff.)

I have stated my connection with the Central Transfer Company and that it is engaged in hauling less than carload freight for the railroads. I have held that position about two years. I was Secretary of the company, from 1920 until I was made Vice-President and General Manager. The Central Transfer Company has four off-track depots, one at 401 South Third Street, one at 504 South Third Street, one at Third and Plum Streets and one at 1516 North Fourteenth Street. We serve all of the railroads that are defendants in this case, and in addition the Chicago and Alton, the Litchfield and Madison and the Nickel Plate. We operate off-track stations from and to which the railroad rates apply, and we haul the less than carload freight that is delivered to us by the shippers to the various on-line railroad stations of the railroad companies, and we receive for the so-called east side lines, the lines that terminate in East St. Louis, we haul freight from their on-line stations to our off-track stations, where it is delivered to the consignees. The on-track freight depots of the Cleveland, Cincinnati, Chicago and St. Louis, the Baltimore and Ohio, the Pennsylvania, the Mobile and Ohio and the Southern Railway, and the Illinois Central Railroad Companies, are located in East St. Louis. The Missouri-Pacific, St. Louis-San Francisco, Wabash, Chicago, Rock Island and Pacific, Missouri-Kansas-Texas, the Chicago and Eastern Illinois on-track depots are located in
91 St. Louis. They are known as the west side lines. Some of them also have depots in East St. Louis, but

their main on-line depot is in St. Louis. The on-track depots of the Chicago and Alton, the Nickel Plate and the Litchfield and Madison are at East St. Louis. The Chicago, Burlington and Quincy, Wabash, Chicago and Eastern Illinois and L. & N. Railroads have on-track depots on both sides of the river. I believe the Missouri-Pacific has a freight station at Dupo, south of East St. Louis. The Central Transfer Company hauls inbound freight for the eleven lines having on-track depots in East St. Louis. We go over there to get it and bring it across the river and take it to our off-track stations in St. Louis and deliver it there to the consignees. The west side lines designate our off-track stations in their tariffs as places where they will receive outbound freight to be carried over their lines. We receive outbound freight at those depots and haul it to the on-line depots of the west side lines. That freight goes generally into all of the states of the United States, and some foreign shipments. We handle outbound freight for both the east and the west side lines, regardless of its destination. The Columbia Terminals Company serves all of the defendants in the same manner in which our company does. At the time the Interstate Commerce Commission ordered its investigation, in 1927 there were four transfer companies serving these railroads. They were the Central, the Columbia, the McMahon and the Fidelity Companies. At the present time only two of them are engaged in the business. Over 99% of the transfer business of the plaintiff is done for the railroads. We also do some direct delivery business for shippers and some city hauling. Our gross income last year was in the neighborhood of $300,000.00. We have 14 tractors, 68 trailers and one truck. Our employees number a little over 100. Our weekly payroll is about $3,000.00. The monthly payroll would be nearly $13,000.00. Mr. Con P. Curran was the principal owner of the Fidelity Transfer Company. The tonnage hauled by the Columbia and the Central Transfer Companies for the railroads amounts to something over 900,000 tons per year. The plaintiff handles about 150,000 tons of this total. We have no written contracts with the railroads we serve. The arrangement, in some re-
92 spects, is fairly loose, but it is pretty thoroughly understood, I think, by the railroads and ourselves, what our duties are. The movement is covered by publication of a tariff which shows these stations of ours as points at which the St. Louis rates apply and where freight is received and delivered for the railroads. This practice has grown up since the railroads began to employ transfer companies. Our continuation to serve the railroad defend-

ants depends upon their good will, their individual good will.

Cross-Examination

By Mr. Larimore:

The transfer business involved here is that which moves only between on-track and off-track stations of the railroad defendants and between their on-track stations. The east side lines haul less than carload freight to East St. Louis and thereafter it is brought across the river by dray. There is a service called direct-delivery. In this service freight is hauled direct from the on-track depots of the railroads in East St. Louis to the shipper's place of business. The railroads pay for the hauling of the freight to the west bank of the river and the shipper pays the cost of the hauling from the west bank of the river to his place of business. The contract between the Columbia Terminals Company and the Terminal Railroad Association does not interfere with that service so far as the Central Transfer Company's right to engage in it is concerned. We have hauled a very small amount of freight in that service but we do not receive enough from the carriers to compensate us for the service, and the only reason we engaged in it was to expedite a certain movement. For that service we were paid by two people—the shipper and the railroad. For the part we did for the shipper we were paid ample, but for the part we did for the railroad we were not paid as much as the cost of the service. We can still perform that service notwithstanding this contract becomes effective. We can perform it at a loss. There is nothing in the contract between the Columbia Company and the Terminal Railroad Association that prevents us
93 from collecting freight from shippers and hauling it to the depots of the carriers, but we would have to go out and get customers in competition with the Columbia Terminals Company. That contract gives them an advantage over us in securing traffic moved to and from the off-track stations. So far as this contract is concerned, the only traffic of which we complain is that moved between off-track and on-track stations, which is about 99% of our business. In moving that traffic we act as agent of the carrier. We deliver this freight to consignees and receive it from shippers when it is destined for a line haul over some railroad. By delivery to consignees I mean delivery at the edge of our dock to the tailboard of their truck. We perform that service for the railroads. Our off-track station is a station of the railroad. Those stations are carried in the tariffs of the several carriers to and from which their rates apply. Those tariffs are filed with the Interstate Commerce

Commission. In the tariff we have put in evidence as an exhibit, our off-track stations are not named as places where the carriers will receive and deliver freight. We are paid by the railroads for hauling freight between their on-track and our off-track stations. Our Fourteenth Street off-track station is not recognized in any of the tariffs of the defendants. That station is recognized in the tariffs of three railroads but they are not defendants in this case. They are the Chicago and Alton, the Nickel Plate and the Litchfield and Madison. The plaintiff is a member of the Association of Team and Truck Owners and the St. Louis Chamber of Commerce, but not the St. Louis Shippers Conference Association.

Plaintiff Rests.

Thereupon the defendants, to sustain the issues on their behalf offered the following evidence:

Defendants' Exhibit No. 2.

This exhibit was offered by the defendants and admitted in evidence. This exhibit is identical with plaintiff's Exhibit No. 6.

Defendants' Exhibit Nos. 3 and 4.

These exhibits are reports of the Interstate Commerce Commission in Docket No. 19594, in proceedings entitled "Transfer of Freight Within St. Louis and East St. Louis by Dray and Truck for and on Behalf of the Rail-
94 roads". Exhibit No. 3 is the first report of the Commission in those proceedings and was handed down May 13, 1929 and is reported in Vol. 155, page 129 of the official reports of the Interstate Commerce Commission. Exhibit No. 4 is the second report of the Commission in said docket and proceedings and was handed down July 27, 1931, officially reported in Vol. 177, page 316 of the official reports of said Commission. Defendants offered these exhibits in evidence to sustain their defense that the Commission had full jurisdiction of the subject-matter of plaintiff's bill, and exercised that jurisdiction and made the reports contained in said exhibits in disposing of the controversy.

EDWARD CLEMENS, a witness of lawful age, being produced by the defendants, sworn and examined, testified as follows:

Direct Examination

By Mr. Larimore:

My name is Edward Clemens. I am Traffic Manager of the Terminal Railroad Association of St. Louis. I have been connected with that Association thirty-one years. I remember when the subject-matter of this controversy was before the Interstate Commerce Commission. I testified in the later hearings. My understanding is that the only matter involved in connection with the contract entered into between the Columbia Terminals and these carriers is the transfer of L. C. L. freight between on-track stations and off-track stations, and between on-track stations of the carriers. We calculate that putting into effect the terms and conditions of the contract entered into, to be effective June 1, 1931 would entail a saving of $245,000.00, roundly, based on traffic handled by transfer companies in 1930. This latter statement of the witness was admitted in evidence, over the objection of plaintiff. I understand that some of the off-track stations were located at the places of business of the different transfer companies. If we had several transfer companies engaged in business in St. Louis and East St. Louis switching districts, and all participating in the transfer of L. C. L. freight between off-track and on-track stations of the carriers, we would have as many off-track stations, at least, as we had transfer companies. I remember when the plaintiff
95 opened what it considered to be an off-track station on Fourteenth Street. I understand that it is charged in the bill of complaint as being an off-track station that the carriers should be required to recognize. One purpose of the carriers in arriving at the one-transfer plan is to determine for themselves where the off-track station should be located, and who should operate it. That is evidenced by the fact that, in designating the seven off-track stations in St. Louis, to and from which the St. Louis rates of the carriers apply, as outlined in the tariff to be effective November 1, 1931, the carriers not only eliminated certain stations of the Central Transfer Company but they also failed to recognize two of the existing stations of the Columbia Terminals Company. Under the present method and before the filing of these tariffs the greatest abuse came about from the fact of locating what might be called competitive stations—that is hardly a proper designation—duplicate stations, in the same general locality, which, of course, if all the transfer companies engaged as agents of the carriers were supported, would necessitate unnecessary support of, and investment in facilities and equipment. Another abuse was the practice of the transfer companies employing soliciting

forces to vie with each other to see which one of them would do the hauling for the carriers. The expense of that was applied in the cost of operations and ultimately borne by the carriers who employed the transfer companies as their agents. There were some cases where off-track stations were located across the street from on-track stations, where the haul would only be across the street from the off-track to the on-track station. The elimination of those duplications would have the effect of bringing about the savings that are reflected to some extent in the terms of this contract. The freight involved here is only that which moves between off-track and on-track stations and between on-track stations of the carriers. This freight when in possession of the transfer company operating the off-track station, is in the possession of the carrier. The transportation of said freight between the off-track and the on-track station is railroad transportation, absolutely, which is run by truck rather than by railroad, by car or engine. I am familiar with the traffic situation in St. Louis and East St. Louis switching district,
96 and the facilities available and the amount of traffic generally handled in that district. It is proposed to eliminate from the tariffs two off-track stations now used by the Columbia Terminals Company, and those of the plaintiff. I should say that the one-transfer plan will facilitate the movement and handling of L. C. L. freight in the St. Louis district. I should say that the facilities of the Columbia Terminals Company contemplated to be continued in use here are 100% more than adequate to handle the traffic.

Cross-Examination

By Mr. Arnold:

The Terminal Railroad Association, as a terminal company, has no interest in the movement of this traffic by motor truck or dray and truck. Whatever less than carload business the Terminal Association does for any of these individual lines is handled in freight cars. The Terminal Association does not transport any freight by dray or truck for any of the defendants. To my knowledge none of the officials or executives of the Terminal Association have ever participated in any of these traffic conferences. As I understand it, the Terminal Association never got into this controversy until last February; that is the first time the Terminal ever officially took any part in the controversy. I am familiar with the contract between the Terminal Association and the Columbia Terminals Company, contained in plaintiff's Exhibit 10. The Terminal Association files no tariffs designating off-track stations and will not deliver any freight and

never has delivered any freight to an off-track station company. The Terminal has never employed a transfer company to operate off-track stations to handle less than carload freight. I have calculated personally the savings the carriers would make by this contract. That would be spread among all of the railroads served by the transfer company. No one of the defendants would save any such sum as that. This annual saving of $240,000. would be spread among the defendants in this case and also the other roads that use this off-track station service that are not defendants. The savings effected by the contract would be individual to the railroads. I think it is obvious that the New York Central would have no interest in what the Missouri-Pacific saves, and that is true of all the other roads which are independent of each other. As to those that are independent and have no relations with each other, they would have no interest in
97 what the other saves by this one-transfer plan. I understand that neither the Columbia Terminals Company nor the Central Transfer Company has ever had any written contract with the railroads they serve.

By the Witness:

If the New York Central is dissatisfied with the service rendered by either the Columbia or the Central all they would have to do would be to notify either one of them that they were going to discontinue their service and file a tariff eliminating their stations.

"Mr. Thomas Pierce: Have to get permission of the Commission.

"Mr. Arnold: Well, that is a question of law, too."

By the Witness:

I do not know that the New York Central would have to have the assistance or the aid of the other nineteen railroads to enable them to abandon this service. I know, under competitive conditions, it probably is necessary for the carriers to state what facilities they are going to recognize, and the Commission has, according to my information, approved the continuation of the seven stations that are named in the tariff now on file. The contract between the Terminal Asso-
98 ciation and the Columbia Terminals Company was not entered into for the purpose of enabling the Missouri-Pacific and Frisco to discontinue the use of off-track stations across the street from their on-track depots. They could do that without this contract. If the tariff under suspension had been allowed to go into effect it would have eliminated

this cross-town hauling of freight. If the tariff which does not include the off-track stations of the plaintiff is allowed to go into effect, that company will not receive and deliver any more freight at off-track stations for these defendants. They could still participate in direct deliveries and hauling to the off-track stations of the Columbia Company for shippers and from such stations.

Redirect Examination

By Mr. Larimore:

The tariff on file with the Commission specifies the off-track stations which are continued to be recognized, if and when the tariff becomes effective. The tariff on file with the Commission presents a complete plan of the participating carriers. This tariff that is under suspension at this time will bring about all of the conditions that are sought to be corrected by this contract, effective June 1, 1931, which is not in effect now by reason of this restraining order.

Recross Examination

By Mr. Arnold:

The reason why the Missouri-Pacific did not discontinue the use of off-track stations as permitted by the Commission is because the tariff was suspended.

JOSEPH B. MORRILL Recalled.

Direct Examination

By Mr. Larimore:

The witness was shown defendants' Exhibit No. 1, and admitted that he signed said exhibit. This exhibit was offered by the defendants and admitted in evidence. It is a letter of the Central Transfer Company, signed by Joseph B. Morrill, Vice-President and General Manager, and is addressed to Mr. Henry Miller, President, T. R. R. A. of St. Louis, Room 107, Union Station, St. Louis, Missouri, dated
99 April 21st, 1931, and reads as follows:

"Mr. Henry Miller,
President, T. R. R. A. of St. Louis,
Room 107, Union Station,
St. Louis, Mo.

Dear Mr. Miller:

Last Saturday, April 18, 1931, the writer called at your office to make some inquiries about the handling of the less-than-carload freight. He learned from you that you had in-

vited and received bids for performing the drayage service and the operation of off-track stations from two Chicago drayage firms but had not seen fit to ask for bids from the Central Transfer Company. At his request you agreed to receive a bid from the Central Transfer Company provided it reached you on or before the following Wednesday, April 22, 1931.

From certain papers you had you gave him the following specifications of which he made a memorandum:

(1) Bidder is to supply one off-track station in North St. Louis; one off-track station in South St. Louis; one off-track station centrally located; and one off-track station in East St. Louis;

(2) Furnish a bid for handling the following interchange freight:

(a) Between on-line depots in East St. Louis—40,000 tons;

(b) Between on-line depots in St. Louis—40,000 tons;

(c) Between on-line depots in St. Louis and East St. Louis..... 260,000 tons.

(3) Furnish a bid for handling the following off-track station freight:

(a) From off-track stations in St. Louis to on-line stations in East St. Louis ..... 200,000 tons;

(b) From on-line stations in East St. Louis to off-track stations in St. Louis ..... 110,000 tons.

You also mentioned an item of 177,000 tons which moved from off-track stations in St. Louis to on-line stations in St. Louis but which movement would be discontinued.

We find that these specifications are deficient in the following respects:

(1) The volume of tonnage moving through the East St. Louis off-track station was not supplied;

(2) The part of the interline freight, which totals 260,000 tons, in (2) (c) above that moves east bound and the part that moves west bound was not given as a separate figure yet is quite important in considering the number of empty movements. We have assumed about 75% west-bound and 25% east-bound.

(3) The length of the contract was not stipulated. We have assumed the contract to be for a period of at least five years (5) years.

100 In all of the above, the tonnage figures are for a period of one year.

On this basis, assuming that we are to handle all of this business referred to and assuming the volume to be substantially as given, we are prepared to furnish off-track stations in the general locality you specified and supply the necessary equipment to handle the less-than-carload freight referred to above at the following rates per ton of 2,000 pounds:

(1) Interchange freight between on-line stations in St. Louis .. ..$1.00 per ton.

(2) Interchange freight between on-line stations in East St. Louis .. .. $1.00 per ton.

(3) Interchange freight between stations in St. Louis and East St. Louis .....$1.20 per ton.

(4) Freight from off-track stations in St. Louis to on-line stations in East St. Louis ..... $1.80 per ton.

(5) Freight from on-line stations in East St. Louis to off-track stations in St. Louis .....$2.00 per ton.

In case you should decide to move the 177,000 tons per annum from off-track stations in St. Louis to on-line stations in St. Louis we would undertake to handle this at the rate of $1.60 per ton.

We are prepared to get what additional equipment and facilities we would need to do this work in a reasonably short time, not to exceed 90 days after signing a contract. We are prepared to give suitable guarantees of faithful performance.

Respectfully submitted,

CENTRAL TRANSFER COMPANY
By Jos. B. Morrill,
Vice-President and General Manager.

Examination

By Mr. Arnold:

The approximate value of the investment in the properties and equipment of the Central Transfer Company is $250,-

000.00. In regard to my letter to Henry Miller I heard they were going to give all of this business to the Columbia Company. Then I went and called on Mr. Miller and asked him if I could bid on this business, and he said I could but with no specifications at all. He did not furnish me any specifications and did not give me any consideration either.

By Mr. Larimore:

We operate this off-track station on Fourteenth Street for some of the railroads. That station is not recognized by the railroad defendants in this case as an off-track station in their tariffs. As to whether it has been the practice of
101 the plaintiff to receive L. C. L. freight at its Fourteenth Street Station and show it received at some other off-track station, my answer would be "No". We receive freight at that station that is destined to a line haul by carriers that do not recognize that station. We haul that freight for the shipper to a station that is recognized by the carrier for the line haul, and bill it out of that station. When we receive freight at that station to be carried by a carrier which does not recognize it, we haul the freight to Third and Plum Streets that is recognized by that carrier. The Central Transfer Company owns all of its equipment.

Defendants Rest.

It was agreed by counsel for plaintiff and defendants that certain portions of the briefs filed by the plaintiff and the defendants before the Interstate Commerce Commission should be considered by the court as evidence of the positions taken by counsel, in the case, before the Commission. The portions of the briefs which counsel might desire so to use were to be contained in the briefs filed by counsel, for the use of the court.

Counsel for Columbia Terminals Company asked and was granted leave to withdraw from the record its formal written motion to dismiss plaintiff's bill. Said motion was withdrawn by counsel.

Plaintiff abandons the allegation of its bill that a certificate of public convenience and necessity is required.

The foregoing constitutes all the evidence offered in the case.

At the conclusion of the oral argument the cause was submitted to the court for its decision. The court requested counsel to submit proposed findings of fact and conclusions of law and briefs, which was accordingly done.

(Approval of Narrative Statement of Evidence by Counsel and District Judge.)

It is stipulated and agreed by the parties hereto that the foregoing narrative statement of the proceedings, evidence, objections and rulings of the court at the trial of this cause shall constitute the record thereof for appellate review.

GLENDY B. ARNOLD,
Attorney for Plaintiff.

H. H. LARIMORE,
C. S. BURG,
Attorneys for Defendants.

Approved: 11-24-1931.

CHARLES B. DAVIS,
District Judge.

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102 (Defendants' Exhibit 3.)

Interstate Commerce Commission

No. 19594[1]

Transfer of Freight Within St. Louis and East St. Louis by Dray and Truck for and on Behalf of Railroads

Submitted October 10, 1928. Decided May 13, 1929

Upon investigation on our own motion and upon consideration of schedules filed by respondents concerning the receipt, delivery and transfer of freight within the St. Louis-East St. Louis terminal district, by means of drays or trucks operated on and over public highways, and the allowances paid or to be paid for such services, Found:

1. That the proposal of carriers, other than the Chicago & Alton, to employ a single transfer company for the operation of off-track stations and the haulage between such stations and the on-track stations of the railroads, and in the inter-

[1] This report also embraces I. and S. No. 2934, Off-Track Station and Constructive Receipt and Delivery of Freight at St. Louis, Mo., and East St. Louis, Ill.

change of freight between railroads is not violative of any provision of the interstate commerce act.

2. That the proposal of carriers, other than the Chicago & Alton, to reduce the number of off-track stations in St. Louis from 12 to 7, and at East St. Louis, from 3 to 2, will not be harmful to the public interest or result in unreasonable and inadequate service.

3. That the present and proposed maintenance of a constructive station at the west end of Eads bridge as an aid to the direct receipt and delivery of freight from and to shippers and consignees is not unlawful and, as at present operated, does not result in unlawful practices.

4. That the proceedings will be held open in order to afford opportunity to respondents to enter into a cost study of the service considered and to prepare new tariffs and contracts in the light of such study, to be presented at a further hearing.

E. C. Kramer, E. A. Smith, M. G. Roberts, H. H. Larimore, L. H. Strasser, Guernsey Orcutt, A. H. Kiskaddon, D. P. Connell, Jas. Stillwell, H. S. Harr, N. W. Proctor, C. S. Burg, and R. F. Lesemann for all respondents other than Chicago & Alton Railroad Company; Silas H. Strawn, Guy A. Gladson, S. G. Lutz, and F. H. Towner for Chicago & Alton Railway Company, respondent; Frank E. Webster for Chicago & Eastern Illinois Railway Company, respondents; D. W. Snyder, W. H. Wylie, and H. I. Green for Illinois Traction System.

Glendy B. Arnold for St. Louis Chamber of Commerce; W. E. Rosenbaum for St. Louis Shippers Conference Asso-
103 ciation; R. W. Woolley, Esch, Kerr & Shipe, and Wm. H. Schaumberg for Central Transfer Company; Paul Y. Versen for Association of Team and Truck Owners; Clement A. Schmidt for Northwestern Industrial District; B. M. Godfrey for various shipping interests, protestants.

Wm. B. Madden for Wellston Chamber of Commerce; Julius T. Muench and Forrest G. Ferris, Jr., for City of St. Louis; L. H. Forman and J. Schwartztranber for East St. Louis Chamber of Commerce; and W. P. Heddon for Port of New York Authority, parties in interest.

Report of the Commission

Porter, Commissioner:

No. 19594 is an investigation on our own motion in respect of the collection, receipt, delivery, transfer, or other handling

of freight in, within, and between the switching districts of East St. Louis, Ill., and St. Louis, Mo., by means of motor trucks, drays, or other vehicles operated on and over the public highways. I. and S. No. 2934 concerns the lawfulness and propriety of the practices provided for in tariffs filed by the railroads serving East St. Louis and St. Louis with their own rails or holding themselves out to serve those communities through their published tariffs. In the suspended tariffs and in contracts to be filed with them it is proposed to effect changes in allowances paid to transfer companies for the handling of freight for and on behalf of the carriers, in the number of off-track stations to be maintained in East St. Louis and St. Louis, and to restrict railroad hauling to one transfer company. Carriers respondent to this order of investigation and suspension have agreed to postpone the effective dates of these schedules abiding this decision. At the request of the parties, a proposed report was served to which exceptions were filed by respondents and protestants and the case has been orally argued.

The Service, Its Description and History

The service here considered consists primarily in the delivery and receipt of less-than-carload freight at East St. Louis and St. Louis. Partly because of physical obstacles, such as the Mississippi River and the topography of the St. Louis side thereof, partly because of custom and usage, and partly because the station facilities of the Terminal Railroad Association have been deemed inadequate, less-than-carload freight in the St. Louis-East St. Louis district has been handled in a manner different from that obtaining at other points in the United States. The system rails, proper, of im-
104 portant lines, such as the Big Four,[2] and the Baltimore & Ohio[3], end in East St. Louis, but by their tariffs these carriers provide rates to and from St. Louis, except from a restricted area not here important, on the same basis as ap-

[2] When specific railroads are referred to in this report, shortened terms will be used when such terms are universally known and accepted.

[3] The railroads having or operating freight stations only on the east side are the Pennsylvania, Baltimore & Ohio, Big Four, Southern, Mobile & Ohio, Illinois Central, Chicago & Alton, Nickel Plate, and Litchfield & Madison. The roads having freight stations only on the west side are the Missouri-Kansas-Texas, Rock Island, Illinois Traction System, and the Frisco. The roads having freight stations on both sides of the river are the Wabash, Chicago & Eastern Illinois, Burlington, and Louisville & Nashville at East St. Louis proper and the Missouri Pacific at Dupo, Ill., about 3 miles south of East St. Louis. The St. Louis Southwestern has a freight station at East St. Louis for carload freight only. When the expressions "west-side roads" or "east-side roads" or the like are used in this report, they will have reference, except as specifically indicated, to lines having facilities only on either side of the river.

plies to and from East St. Louis. They, therefore, hold themselves out to deliver at and ship from St. Louis and, not having their own rails, and those of the Terminal Railroad Association, of which they are coowners not affording adequate facilities for the receipt and delivery of less-than-carload traffic, they employ other means of performing the service between their rail ends and St. Louis. This service is performed in various ways, as hereinafter shown.

The first railroad to enter East St. Louis was the Ohio & Mississippi, now part of the Baltimore & Ohio, in 1854. In the same year the St. Louis, Alton & Terre Haute, now part of the Illinois Central, entered East St. Louis. The Big Four built to East St. Louis in 1856, the Pennsylvania in 1868, and the Louisville & Nashville in 1870. At that time all freight, carload and less than carload, for St. Louis was handled across the river by wagon or ferry at the shippers' expense. In 1870 the Wiggins Ferry established rail terminals on both sides of the river. In 1874 the Eads Bridge was opened for traffic. The Merchants Bridge was completed in 1890, the McKinley Bridge in 1910, and the Municipal Bridge in 1914. Notwithstanding the existence of the bridges, traffic has been handled by dray or truck between St. Louis and East St. Louis since 1854. Two methods of receiving and delivering less-than-carload freight through the medium of drays or trucks have been and are employed, viz, through off-track stations maintained and operated by recognized transfer companies, and by the so-called direct-delivery plan under which the freight passes through a constructive station in its journey to and from the trader's places of business from and to the on-track freight stations in East St. Louis. Carload freight destined to St. Louis is ordinarily delivered from team tracks of the Terminal Railroad Association for the east-side lines, or from team tracks of individual west-side lines having such facilities in St. Louis, although some carload freight is
105 handled by vehicles under the direct-delivery plan. No provision is made for the handling of carload traffic through off-track stations. The history of the Terminal Railroad Association is set out in detail in United States v. Terminal R. R. Asso. of St. Louis, 224 U. S. 383.

The Valentine Express was the first general transfer company to handle freight between East St. Louis and St. Louis. In 1859 this company was taken over by the Ohio & Mississippi Transfer Company. Part of the facilities so taken over were off-track stations in St. Louis. At that time these facilities were merely warehouses or platforms maintained by

the transfer companies for their convenience in collecting and distributing freight. In 1860 the name of the latter company was changed to the St. Louis Transfer Company. In 1863, the East St. Louis Transfer Company was organized. These companies were consolidated in 1875 under the name of St. Louis Transfer Company and in the same year the Wiggins Ferry Company organized a wagon-transfer service to operate in competition. The St. Louis Transfer Company absorbed the Wiggins Company in 1876. Service by the one company was continued until 1902. The Columbia Transfer Company was organized in 1902, the Fidelity Transfer Company in 1904, and the Central Transfer Company in 1915. In 1918, there was a consolidation of the Columbia Transfer Company and the St. Louis Transfer Company and the new company, the Columbia Terminals Company, purchased the Fidelity Transfer Company in June, 1927. The Columbia Terminals Company also acquired controlling interest in the McMahon Transfer Company, a small concern in East St. Louis, in 1926. At present only the two companies, Columbia Terminals Company and the Central Transfer Company are in operation. These companies will be referred to as the Columbia and the Central.

During the early period of this transfer business the railroads were not particularly concerned with the charges made by the transfer companies for this transriver service because such charges were added to the rail rates to and from East St. Louis. It was a matter of vital concern to the shippers of St. Louis, however, and a committee known as the Municipal Bridge and Terminal Commisssion was appointed by the mayor of St. Louis with the view of inducing the east-side lines to publish specific rates to St. Louis. In January, 1906, after numerous conferences, the carriers established joint rates to St. Louis composed of the rates to East St. Louis plus certain arbitraries and these rates were made applicable to and from the warehouses of the transfer companies. These arbitraries, being less than the charges of the transfer companies, the railroads became directly interested in the transfer cost. The adjustment so agreed upon mitigated but did not remove the dissatisfaction of the St. Louis shippers and after renewed conferences the carriers finally agreed to establish rates to St. Louis on a parity with those to East St. Louis and to continue service to and from the warehouses, or off-track stations. This latter service was and is necessary because of the fact that the facilities of the Terminal Railroad Association were and are inadequate to

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handle the less-than-carload freight. When this practice was established the off-track stations became just what the name implies, stations designated in the tariffs where freight would be received and delivered in the same manner as though they were located on the carriers' tracks. It will thus be seen that the shippers of St. Louis have used off-track stations or their equivalent for an uninterrupted period of 63 years.

Respondents do not propose to discontinue this service. They desire to reduce the number of off-track stations now in operation, to enter into new contractural arrangements for the haulage to and from and the operation of the stations to be continued, and to constitute the Columbia their sole agent for this service. The Chicago & Alton, however, does not contemplate an exclusive contract with the Columbia. It also proposes to increase direct-delivery allowances to 3 cents on carload and 5 cents on less-than-carload freight, in contrast to similar allowances of 1 cent and 2 cents proposed by all other respondents. When allowances are referred to herein in cents, they are in cents per 100 pounds; when in dollars, they are per ton of 2,000 pounds.

History of Allowances on Less-Than-Carload Traffic

In the following table the history of the allowances on less-than-carload traffic for interchange and off-track station services rendered by the transfer companies is set forth in detail:

	From off-track stations in St. Louis to railroad stations in East St. Louis		From railroad stations in East St. Louis to off-track stations in St. Louis		From off-track stations in St. Louis to railroad stations in St. Louis		From railroad stations in St. Louis to off-track stations in St. Louis		From railroad stations in St. Louis to off-track station in East St. Louis	
	Rate	Min.	Rate	Min.	Rate	Min.	Rate	Min.	Rate	Min.
Aug. 15, 1906	5	15	5	15	3	15				
Feb. 29, 1908	5	15	5	15	3	15			5	15
Jan. 2, 1918	6	15	7	15	4	15	5	15	7	15
Sept. 2, 1918	7.5	19	9	19	5	19	6.5	19	9	19
Sept. 8, 1919	8.5	21	10	21	5.5	21	7	21	10	21
Sept. 1, 1920	11	27	13	27	7	27	9	27	13	27
Apr. 10, 1922	9	27	12	27	6	27	9	27	12	27
May 1, 1923	8	25	11	25	6	25	8	25		
	[1]		[1]		[1]				[1]	
June 1, 1924	$2.41		$2.70		$2.00				$2.70	
	[1] [2]		[1] [2]							
	$2.25		$2.45							
	[1]		[1]		[1]				[1]	
Proposed	$2.31		$2.60		$1.90				$2.60	

[1] Allowance per net ton; other allowances are in cents per 100 pounds.

[2] Present allowance to Central Transfer Company.

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	From off-track stations in East St. Louis to railroad stations in St. Louis		Between railroad stations in St. Louis		Between railroad stations in East St. Louis		Between railroad stations in St. Louis and railroad stations in East St. Louis	
	Rate	Min.	Rate	Min.	Rate	Min.	Rate	Min.
Aug. 15, 1906	5	15	3	15	3	15	5	15
Feb. 29, 1908	5	15	3	15	3	15	5	15
Jan. 2, 1918	6	15	3	15	3	15	5	15
Sept. 2, 1918	7.5	19	4	19	4	19	6.5	19
Sept. 8, 1919	8.5	21	4.5	21	4.5	21	7	21
Sept. 1, 1920	11	27	6	27	6	27	9	27
Apr. 10, 1922	9	27	6	27	6	27	8	27
May 1, 1923			5	25	5	25	7	25
	[1]		[1]		[1]		[1]	
June 1, 1924	$2.41		$1.71		$1.64		$1.92	
	[1]		[1]		[1]		[1]	
Proposed	$2.31		$1.61		$1.54		$1.82	

[1] Allowance per net ton; other allowances are in cents per 100 pounds.

It will be observed that increases amounting to about 25 per cent were allowed to the transfer companies on January 2, 1918, September 2, 1918, and September 8, 1919, and an increase of about 30 per cent on September 1, 1920. At that time the railroads became actively concerned about the mounting transfer costs and by April 10, 1922, succeeded in effecting a reduction of about 11 per cent. On May 1, 1923, a further 10 per cent reduction was made by the Central but not by the Columbia and on June 1, 1924, the allowances were changed to a flat tonnage basis. Prior to that time there were some 188 excepted commodities as to which the allowances ranged from 11 cents to 38.5 cents per 100 pounds. The change to a flat tonnage basis did not result in any increase or reduction in the total allowances paid. The allowances were arrived at by dividing the revenue received by the transfer companies over a certain period by the amount of tonnage handled. The present allowances to the Columbia and Central, respectively, for the service from on-track stations in East St. Louis to off-track stations in St. Louis, are $2.70 and $2.45 per ton. The Central does not maintain any off-track stations in East St. Louis. Under the proposed tariff there is to be a flat reduction of 10 cents per ton in the allowances for all services.

The Scope of the Investigation

Before taking up the merits of the case, it seems appropriate to point out that the testimony of certain witnesses and statements by certain counsel on brief indicate an incorrect understanding of the scope of this inquiry. As stated, the investigation deals only with the establishment, maintenance and operation of off-track stations and with the regulations and practices of and the allowances paid by the railroads for
the transfer, receipt, delivery, or other handling of
108 freight through such stations or through constructive
stations by dray or trucks operated over public streets and highways for and on behalf of railroads. It does not, as certain counsel infer, contemplate any findings or orders in respect of the maintenance of existing or the construction of new on-track stations, or in respect of the operations and practices of the Terminal Railroad Association. It should be understood that we are here dealing solely with terminal trucking service and with off-track and constructive freight stations and not with the entire terminal situation at St. Louis, except in so far as consideration of the latter might be helpful in arriving at a solution of the former.

The Proposed Contract.

The form of contract proposed to be executed between the eastside lines, other than the Alton, on the one hand, and the Columbia on the other hand, is reproduced as an appendix to this report. In it the Columbia agrees, among other things, to provide and maintain, at its sole cost and expense, off-track station facilities as therein designated; to maintain adequate forces and equipment for the prompt and efficient handling of freight between on-track stations, and between on-track and off-track stations; to load and unload such freight into or out of its equipment; to collect charges, observe embargoes, and to act as the agent of the railroads in all respects as if the railroad were itself operating the off-track stations; to assume responsibility for all freight while in its possession; to comply with the workmen's compensation laws of the States of Missouri and Illinois; to carry adequate insurance; to consolidate, discontinue, or abandon station facilities upon the written request of the committee of railroad representatives; to secure approval and consent of said committee before increasing facilities; and to furnish satisfactory bond guaranteeing the faithful performance of its contractual duties. The railroads agree, among other things, to designate the off-track stations so provided by the Columbia as the only off-track stations at which freight will be delivered or received; to deliver to the Columbia all less-than-carload freight for handling between on-line stations in East St. Louis and St. Louis; to make and continue to pay allowances for the various services as provided therein for the first 90 days the contract is in effect; to appoint a supervisory committee empowered to approve or reject changes in allowances and for the examination and inspection of books; and to give prompt consideration to any request of the Columbia looking to the increase or decrease of station facilities.

The parties mutually agree, among other things, that the allowances named in the contract shall remain in
109 effect for 90 days, but that as soon thereafter as practicable a committee appointed by the railroads and representatives of the Columbia shall make a cost study to determine the amount of allowance to be paid; that allowances so fixed shall remain in effect for a 6-month period; that at the end of such 6-month period, and of each successive 6-month period, the parties shall agree upon and designate the allowances to be paid; that any reduction from the basis

of allowances provided in the contract or to be thereafter fixed, which is based on reduced costs, shall be limited to one-half of the reduced cost per 100 pounds or per ton as determined; to provide for a board of arbitrators to settle disputes, other than disputes as to charges; that the agreement shall remain in effect for a period of two years; that they will cooperate with each other in fostering the direct-delivery plan of handling freight through the constructive station and that the allowance to be made therefor will be 2 cents on less-than-carload freight and on fruits and vegetables, in carloads, and 1 cent on all other carload freight; and that the Columbia shall act as the agent of the railroad between on-line freight stations or teams tracks in East St. Louis and the constructive station at the west end of Eads Bridge, and as the agent of the consignor or consignee between such constructive station and the traders' places of business.

Specific Services To Be Discontinued Under Proposed Schedules

Some of the off-track stations in St. Louis are equipped for warehousing in the upper floors. For some years it has been the practice of certain eastern and southern lines to make an allowance of 7 cents on carload traffic handled from team tracks in East St. Louis to off-track stations in St. Louis, where the goods are put in storage. In order to meet this competition the west-side lines established an allowance of 4 cents from their team tracks in St. Louis to off-track stations in St. Louis. By this means shippers of sugar and rice, for example, are accorded what virtually amounts to store-door delivery of carload traffic placed in storage, which should move to team tracks in St. Louis or, in lieu thereof, through the constructive station, and be handled to the warehouses at the consignee's expense. It is proposed to discontinue these allowances so that hereafter such consignees may elect whether to take delivery on the team tracks in St. Louis or avail themselves of the direct-delivery plan under which the transfer company will receive an allowance from the railroads for the movement to the constructive station at the west end of Eads Bridge and the balance of the drayage charge from the consignee.

As a matter of law the carrier is obligated to deliver carload freight at a public team track or at a private industry track. The only other alternative at St. Louis is the delivery through the constructive station. Any practice of according service in addition to this, such as that

entailed in the movement of carload freight from recognized team tracks in East St. Louis or St. Louis to warehouses located above off-track stations is gratuitous, has no warrant in fact or in law, is open to serious abuse by way of discriminations, is an unwarranted concession to those receivers who thus avoid an expense of drayage rightfully to be borne by them, and should be discontinued immediately.

The Missouri Pacific and Frisco have on-track stations located on the south side as well as the north side of St. Louis. Notwithstanding that fact they have for years paid allowences for the hauling of freight between off-track stations of the transfer companies and their on-track stations in St. Louis. An extreme illustration of this wasteful expenditure is afforded in the case of the off-track station of the Columbia at Seventh and Cerre Streets. This is an outbound station purchased from the Fidelity Transfer Company and located directly across the street from the Frisco outbound depot. So long as the allowance remains in effect it is possible for a shipper to dump outbound freight for movement over the Frisco at this off-track station and for the handling of it across the street, very often accomplished by a truck-to-truck transfer without passage over the off-track station platform, the Frisco has been and is paying an allowance of $2 per net ton. The situation is only slightly less flagrant in respect of the Missouri Pacific on-track station which is only 210 feet away from this outbound depot. It was situations such as these that finally brought the east-side and west-side lines, strongly competitive, to a realization that corrective measures must be applied to prevent gross waste of revenue. Under the proposed tariffs the Missouri Pacific and Frisco, with the exception hereinafter noted, will discontinue use of off-track stations both on the south side and north side of St. Louis and will use their on-track facilities for the receipt and delivery of less-than-carload freight.

To offset any competitive disadvantage which these lines might suffer by reason of this step, the other west-side lines having on-track facilities on the north side of St. Louis are to discontinue the use of off-track stations in that locality and confine their use of off-track stations to those located on the south side. The plan may be outlined in the following general way: (1) The east-side lines having no station facilities in St. Louis will use off-track stations on both the north side and south side of that city; (2) the west-side lines having on-track stations on both the north side and south side of St.

Louis will use no off-track stations in St. Louis; (3) the west-side lines having on-track stations only on the north
111 side of St. Louis will confine their use of off-track stations to those located on the south-side; (4) the west-side lines, only, will use the two designated off-track stations in East St. Louis.

The Missouri Pacific is to continue temporarily to use the out-bound off-track station at Seventh and Cerre Streets as its own station. This line has two on-track stations in St. Louis on the south side, one at Seventh and Poplar which handles business for west-bound movement and one at Main and Gratiot which originally belonged to the Iron Mountain and through which freight is handled for southbound movement. It is the ultimate aim of the Missouri Pacific to consolidate those facilities but until that is done it has arranged to use the off-track station referred to solely for the convenience of shippers in making it unnecessary for them to make two stops with Missouri Pacific tonnage. The station is to be strictly a Missouri Pacific facility.

Under the present tariffs no allowance is provided for the movement of freight by a transfer company from a trader's place of business in East St. Louis to an on-track station in St. Louis for westbound movement. An allowance of $2.41 is made for the transfer of freight from off-track stations in East St. Louis to on-track stations in East St. Louis, but this allowance contemplates station service in East St. Louis. At present if a shipment is handled by a contract transfer company direct from a consignor's door in East St. Louis to an on-track station in St. Louis the carriers are paying $2.41 per ton even though the shipment does not pass through an off-track station. They justify the practice by stating that the $2.41 allowance is the only one provided in the tariffs. The practice is to be discontinued and it should be. Under it no one has benefited except the transfer companies and the carriers have been wasting their revenues by their failure to provide for a direct-delivery allowance, as they have done in the opposite direction.

Respondents hope to effect further economies by reducing the number of off-track stations but that phase of the case will be dealt with in another portion of the report.

Position of East St. Louis Shippers

Prior to the acquisition by the Columbia of controlling interest in the McMahon Transfer Company of East St. Louis,

both of those companies maintained off-track stations on Broadway, East St. Louis, the main artery of traffic leading off Eads Bridge. Under the proposed plan the old station of the Columbia is to be abandoned and the McMahon station at Seventh and Broadway is to be continued. A witness for the East St. Louis Chamber of Commerce testified that the proposed arrangements would be satisfactory to East
112 St. Louis shippers if the carriers provided for the continuance, in addition, of the McMahon station at National Stock Yards, Ill., just north of East St. Louis and about 2 miles from the Seventh-and-Broadway station. The stockyards station is referred to in the proposed contracts but was inadvertently omitted from the tariffs. The East St. Louis shippers desire to use it only for account of the west-side roads and only on outbound westbound business. Respondents agreed at the hearing to include the station in their tariffs. It will not be necessary to discuss further the East St. Louis situation.

The questions in respect of which respondents and protestants are most vitally concerned are (1) the proposed plan of restricting railroad hauling to one transfer company, herein called the one-transfer plan; (2) the proposal to eliminate some of the existing off-track stations; (3) the propriety of the service and the adequacy of the proposed allowances for the handling of freight through constructive stations; (4) the establishment of additional off-track stations in the so-called northwestern and southwestern industrial sections. These questions will be dealt with in the order stated.

One-Transfer Plan.

The most bitterly protested of the respondents' proposals is that which provides for the employment of a single transfer company in the collection, distribution, and interchange of railroad freight, except that handled through the constructive station. The record contains a mass of testimony concerning this phase of the case, the gist of which on protestants' side is that, with competition among transfer companies eliminated, the service will suffer, and that the selected company through the monopoly thus conferred will be in position to underbid other drayage companies in respect of service to and from off-track stations from and to traders' places of business with the result that it will drive other companies from the field and have both the shippers and the carriers at its mercy. Respondents contend that the selected transfer company will act as their agent in the performance of services which they are legally bound to perform, and that they

have the undoubted right not only to select their own agency but to limit their selection to one agency if economy in operation and no unreasonable curtailment of service will result.

There is no question that the proposal of respondents, other than the Alton, will result in conferring a monopoly of railroad hauling, other than that performed in direct-delivery service, upon the Columbia. It is true, as respondents point out, that any railroad, not willing to enter into the pro-
113 posed contract with the Columbia, may contract with another or other transfer companies and that the Columbia has agreed to permit user by such other company or companies of its platform facilities on basis of cost plus 10 per cent. The exception is of doubtful practical benefit. Only one carrier, the Alton, is in disagreement with the railroads which are committed to the one-transfer plan. If that carrier were willing to contract with other transfer companies for the maintenance of off-track stations such stations would, of necessity, be individual to that line and not on a competitive basis with the universal off-track stations of the Columbia. It is not likely that the tonnage of the Alton would make it possible for another transfer company handling Alton tonnage exclusively to compete with the Columbia on the platform-rental basis referred to. The proposed plan is tantamount to a monopoly. It is a lawful monopoly?

The selected transfer company will act as the agent of the carriers in performing a portion of the service which they are legally bound to perform. No transfer company has a vested right to employment as the agent of a carrier. In Express Cases, 117 U. S. 1, decided March 1, 1886, the Supreme Court considered the right of an express company to demand from a railroad the furnishing of facilities to carry on a general express business. Among the questions considered was the right of a railroad to restrict its express business to one company. In its discussion of this question the court said, pages 24, 25:

> On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad

company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may chose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security. (Underscoring ours.)

To the same effect is Donovan vs. Pennsylvania Company, 199 U. S. 279, decided November 27, 1905, in which the court upheld the right of the railroad company to confer by contract with a transfer company the exclusive privilege of transferring passengers between depots or between depots and hotels and residences. The court said, page 297:

It is true that by its arrangement with the railroad company the Parmelee Company, was given an opportunity to control, to a great extent, the business of carrying passengers from the Union Passenger Station to other railway stations[4] and to hotels and private residences in Chicago. But in a real, substantial, legal sense, that arrangement cannot be regarded as a monopoly in the odious sense of that word, nor does it involve an improper use by the railroad company of its property. That arrangement is to be deemed, not unreasonably, a means devised for the convenience of passengers and of the railroad company, and as involving such use by the company of its property as is consistent with the proper performance of its public duties and its ownership of the property in question. (Underscoring ours.)

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Respondents refer also to St. Louis Drayage Co. vs. Louisville & N. R. R., 65 Fed. 39, decided December 17, 1894, which was an action against the railroad to recover damages for unjust discrimination in that the railroad, by contract, absorbed the drayage charges of a drayage company, competing with plaintiff, in respect of traffic between East St. Louis and St. Louis and refused to enter into a similar arrangement with plaintiff. Plaintiff's suit was based upon the theory that it was an independent common carrier and, as such, entitled to equal treatment at the hands of defendant railroad company in the interchange of freight. Conceding plaintiff's definition of its status, the court declined to accept its theory as to its rights following Atchison, T. & S. F. R. R. Co. vs. Denver & N. O. R. Co., 110 U. S. 680, wherein the Supreme Court held that a carrier could, at common law, make its own selection of connections. The court said further, however, that:

[4] This depot-to-depot transfer is a part of the through passenger fares.

The result can not be different whether the contract between the transfer company and the defendant be regarded as a connecting line between two independent carriers engaged in interstate commerce, or whether it be regarded as a selection by the railroad company of the transfer company as an agency for the delivery of defendant's freight between East St. Louis and the City of St. Louis. The law is that the plaintiff can not recover. (Underscoring ours.)

The transfer company there alleged to have been unduly preferred was the St. Louis Transfer Company which, as stated, enjoyed a monopoly of railroad hauling from 1876 to 1902. See also B. & W. Taxi Co. vs. B. & Y. Taxi Co., 276 U. S. 518., Chicago &c Railroad Co. vs. Pullman Car Co., 139 U. S. 79, 89, and Terminal Warehouse Co. vs. United States, F. (2d), decided April 20, 1929.

The cases cited make it plain that, at common law, respondents are within their rights in selecting a single and exclusive agent for the performance of this terminal transportation service. It remains to determine whether the interstate commerce act has laid upon them any duties or restrictions which preclude them from this right of selection.

Section 1, among other things, provides that the term "transportation" shall include all "services in connection with the receipt, delivery * * * and transfer in transit
115 * * * of property handled," requires common carriers subject to the act to "provide and furnish such transportation upon reasonable request" at charges which are just and reasonable, and to establish "just and reasonable regulations and practices" concerning the facilities for transportation and "all other matters relating to or connected with the receiving * * * and delivery of property * * * which may be necessary or proper to secure the safe and prompt receipt * * * and delivery of property * * * upon just and reasonable terms." This section makes the performance of the service a duty on the part of the carrier to the shipper, but contains no suggestion that its common-law right to choose its methods or agency for such performance has been abridged in any way.

As indicated, respondents agree to receive and deliver freight at designated off-track stations, selected by them, and are to hire a transfer company, also selected by them, as their exclusive agent to operate and do the hauling between

these stations and their on-track stations. As stated, no other transfer company has a vested right to employment as an agent of the carriers. If this were not true any transfer company could set up an off-track station in St. Louis and demand its recognition by the carriers. This follows from the very nature of the service. An off-track station is a necessary tool of trade to any drayage company performing railroad hauling, except through constructive stations. Once let it be conceded that these stations may be established as a matter of right and their recognition forced upon the carriers, a wasteful multiplicity is almost a foregone conclusion.

The adequacy of the service under the proposed one-transfer plan can not, of course, be tested by proved facts because the particular plan has never been in operation. The record contains references to the unsatisfactory service of the old St. Louis Transfer Company during the period when it enjoyed a monopoly but no proof that the monopoly, rather than inefficient and short-sighted management, was the cause of it. The Columbia is an efficient organization. It is completely motorized and has up-to-date equipment. Most of its railroad hauling is done by the tractor-and-trailer method, affording the greatest possible flexibility in the matter of loading and unloading. These trailers are placed empty at on-track and off-track stations and when loading is completed a tractor is coupled on. The trailers are 8 by 16 or 18 feet inside measurement, and 8 feet in height. A ridge pole runs in the center from end to end and about 1 foot above the tops of the sides. In bad weather, or when necessary by reason of the nature of the freight, a canvas tarpaulin is spread over this ridge pole and around the load. The coupling and uncoupling of the tractors is done automati-
116 cally and there is a drop-wheel arrangement on the tractors by means of which they retain their level when uncoupled. The Columbia has 430 trailers and 107 tractors in operation.

Other objections stressed by protestants against the one-transfer plan either raise questions which are beyond the scope of the inquiry or must yield because the plan of itself is not unlawful. Of the first character is the objection raised and the fear expressed by the Association of Team & Truck Owners that the Columbia by virtue of its monopoly of railroad hauling will be in position to underbid other drayage concerns in hauling freight between its off-track stations and traders' places of business. If the allowances paid to the Columbia for off-track station haulage are based upon cost of service, plus, or including a fair profit, it follows that it

would have no excess upon which to shade its charge to shippers below a fair and reasonable figure. If, apart from its relation to the railroads, it can secure the private hauling of shippers in its private capacity of a drayage concern, it it entitled to the business the same as any other drayage company.

Of the second character is the showing of record that two railroad officials are holders in a very minor amount of stock in the Columbia, or in the Lapeer Trailers Corporation, its subsidiary. These officials testified that they purchased and now hold this stock solely as an investment and that their ownership of it had no bearing upon the selection of the Columbia as the exclusive agency of the railroads. There is no suggestion or proof that either the purchase or ownership of the stock was, or is, in violation of any statute. In the absence of such proof the matter is of no importance in deciding the questions before us.

The St. Louis Shippers' Conference Association contend that the shippers of St. Louis are entitled in the first instance to one-track stations located on the rails of the Terminal which is merely an extension of the rails of the proprietary lines; that if they waive that right and agree to the substitution of off-track facilities their interests must be consulted and they have the further right to insist that full and free competition be maintained in the management and operation of such stations. Stated another way these contentions assume that the shipper not only has a right to adequate service but may dictate the means employed to effectuate it. We can not agree with this concept of the law. The primary duty of the carrier is to furnish reasonable and adequate service and facilities, and that done, it has the right to choose its methods and its agencies.

Counsel for the St. Louis Chamber of Commerce takes the position that the proposed contracts with the Columbia will create a monopoly in contravention of the Sherman
117 Anti trust Act. 26 Stat. 209, c. 647. He relies upon United States vs. Terminal R. R. Asso., 224 U. S. 383, in which the Supreme Court condemned the arrangements entered into between proprietary lines on the one hand and the Terminal on the other hand. He argues that these transfer companies are here performing by dray or truck precisely the same service that the Terminal performs by rail. Admitting these contentions the case referred to is authority for the conclusion that the arrangement here proposed will not result in an unlawful restraint of interstate commerce. The

commerce there found unlawfully restrained was in the entire traffic from, to, and through St. Louis rather than in the receipt or delivery of traffic at that point. The court stated that if the Terminal Association were to be treated as a mere terminal facility the unification might be deemed promotive of the public interest. It was the grip which the association had upon the ingress and egress of commerce from beyond the terminal area over new and additional lines which made it unlawful. At page 410, the court said:

> Plainly, the combination which has occurred would not be an illegal restraint * * * if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities.
>
> The Columbia is such an agent. Its services are those of a mere terminal facility. The arrangements proposed will not change in any manner the flow of commerce to, from, or through St. Louis, either by the lines now serving it or by others which might later be built, but will merely provide a different means of handling the receipt and delivery of existing traffic.
>
> There is nothing in the so-called one-transfer plan in and of itself which is unlawful. Nor can we conclude upon this record that service under this plan will be inadequate. Experience, alone, will answer that question and if at any time, the service becomes inadequate or is surrounded by practices which are unlawful the shippers have recourse to us through the usual channels of complaint.

Off-track Stations.

Respondents contend that the four off-track stations[3] selected to handle the outbound business have a capacity 29.6 per cent in excess of that which will be necessary for the business to be handled under their proposed plan. They arrive at this conclusion by the following method. In 1926, the total outbound tonnage handled by the three transfer com-

118 panies then operating off-track stations in St. Louis was 1,079,734,461 pounds, or an average of 3,528,544 pounds per working day. From this total they make the following deductions which they insist will accrue as a result of their proposal. A total of 8,635,473 pounds from discontinuance of the practice of allowing 7 cents and 4 cents on carload freight stored in warehouses of the transfer com-

[3] Second and Carr Streets; Eleventh and Spruce Streets; Broadway and Spruce Street; and Broadway and Chouteau Avenue.

panies, as described; a total of 189,378,328 pounds as a result of the abandonment of off-track station used by the Missouri Pacific and Frisco; a total of 11,857,320 pounds as a result of a similar abandonment by the north-side lines of off-track stations on the north side. This leaves a net total of 869,863,340 pounds to be handled at the four selected stations, or an average of 2,842,000 pounds per day. These four stations, in 1926, handled a total of 663,551,950 pounds, and they will have to increase this tonnage by 206,311,390 pounds to accommodate the total tonnage. The sum of the average per day handlings of these four stations is 2,173,000 pounds, indicating a necessity of increasing the sum of those averages by 669,000 pounds. The sum of the peak-day performances of the four selected stations, however, is 3,864,129 pounds, or 842,129 pounds in excess of the new average daily requirements. Respondents measure the capacity of these stations by their peak-day performances. In other words, the 29.6 per cent excess capacity is arrived at by dividing the excess, peak-day over average requirement, by the average requirement. They show also that 28 pounds per square foot of platform space was handled at these stations on the average day and 47.3 pounds per square foot on the peak days, indicating again, according to their theory, an ample platform space.

In respect of inbound traffic similar computations as to the three[6] selected stations purpose to show an excess capacity of 57.5 per cent, based on peak-day performances totaling 1,404,263 pounds as against an average per day requirement, under the proposed plan, of 891,129 pounds.

It is difficult to forecast the adequacy of the selected stations by mere mathematical calculations for the reason that so much depends upon the human element. For example, it can not be said with certainty that every pound of traffic heretofore handled for the Missouri Pacific and the Frisco is to be taken direct to their on-track stations. That destined to local points on those lines will be so handled. But off-track stations, especially those in St. Louis, which act for all roads, afford a convenient place to dump outbound freight and shippers may bear this in mind in routing traffic to competitive points. Then, too, it can not be assumed that off-track station employees will maintain a peak-day pace through-
119 out the year. Nor is it safe to place much weight on the comparison of the amount of tonnage handled per square foot of space on peak days with that so handled on

[6] Broadway and Carr; Sixth and Spruce; Fourth and Valentine.

average days. The record abundantly shows that a great deal of the traffic handled through off-track stations has not received platform service and this condition would no doubt be aggravated on peak days. In any event the capacity of a station is more forcibly demonstrated by the ability or the inclination of the platform crews to keep the freight moving than by a calculation of the platform space available. In the ideal operation of a freight station, especially an outbound station, the platform should be more or less a conduit and not a storage space.

But respondents' calculations do show that the selected stations in their normal operations handled in 1926 about 61 per cent of the normal outbound business and about 72 per cent of the normal inbound business. Computing the deductions made by the respondents in the normal outbound business on the basis of 50 per cent of their expectations on less-than-carload traffic, and allowing full credit for the reductions to be realized in respect of carload traffic, the actual performance of the selected stations in 1926 was over 68 per cent and 82 per cent, respectively, of the anticipated outbound and inbound business. Discontinuance of some of these off-track stations will doubtless throw additional tonnage to the remaining facilities. It is also to be expected that the selected stations will be compelled to provide additional help and find additional means of accommodating the added tonnage. The total excess, peak day over average day, of handling at the four selected outbound stations was 1,511,129 pounds, indicating a fair degree of flexibility in performance. As stated, the average daily performances of the four selected outbound stations in 1926 totaled 2,173,000 pounds. Counting 306 working days in the year, and computing the anticipated tonnage in the manner last above indicated, it will be necessary for the selected stations to increase their total average daily handlings by 1,003,036 pounds, or an average of slightly more than 250,000 pounds per station.

All of the protesting interests are opposed to any reduction in the number of off-track stations. A witness for a large wholesale dry-goods house, which ships or receives about 2,000,000 pounds of less-than-carload freight weekly, testified concerning conditions at all stations in St. Louis, on track and off track. In respect of inbound traffic he testified that the off-track stations are often crowded and that much freight, not delivered until afternoon, could be delivered in the forenoon if the railroads maintained their own on-track stations or if the goods were handled in direct delivery. This witness

expressed the view that direct-delivery service is the ideal service on inbound freight for the reason that it is not only more expeditious through the saving of one station handling but because it would relieve congestion at off-track stations.

Another witness, traffic manager of a concern which ships only outbound less-than-carload freight, testified at length concerning the present conditions at off-track stations on the south side. He conceded that under the present arrangements there is no habitual congestion but he doubts the ability of the four selected off-track stations to handle the tonnage which will be added as the result of the proposed restrictions. His doubt is not based upon any calculation of tonnage figures but merely because he feels that what is now occasional congestion might become chronic if a greater burden is thrown upon the selected facilities.

A witness for the Association of Team & Truck Owners also testified, among other things, concerning the conditions at off-track stations in St. Louis. His position is that these facilities are congested at times even under present conditions and that they could not handle the added tonnage resulting from the abandonment proposed. He introduced exhibits purporting to show the results of personal observations at the various stations. A portion of this study was made in 1922 and 1923 and does not necessarily reflect present conditions. Beginning August 6, 1927, this witness made almost daily inspections of the various depots. In many instances observation of the various depots, often several blocks distant one from the other, were made at 5-minute intervals. The observations were made in most instances while driving by the different stations. On September 20, for example, the witness's notes contain only three entries as follows:

8:30 a. m. Columbia, Broadway and Carr, crowded. Rock Island fair run, Missouri Pacific, good run.

9:45 a. m. Columbia, Broadway and Choutean, east platform good shape, west platform heavy.

In p. m. All depots fair run.

Obviously, general expressions such as "very heavy," "platform jammed with freight," "good run," and the like are not controlling and are not very helpful in deciding whether railroad facilities are adequate. Railroads as well as transfer companies would like to see freight platforms heavily loaded with freight at all times. The test is whether

the freight keeps moving in spite of this condition and this question can not be conclusively answered by 5-minute observations.

As stated, the performance of a freight station depends largely upon the personnel and efficiency of the platform crews. A witness for the Columbia, having charge of the operation of that company's off-track stations, testified
121 that with sufficient men employed and sufficient empty trailers available for loads there is hardly any limit to the capacity of an outbound station. He also expressed the view that fewer outbound stations would concentrate tonnage so that the transfer company would be able to dispatch heavier and more frequent loads to on-track stations. He bases this view on actual conditions at stations under his charge. The largest outbound stations of his company are at Eleventh and Spruce Streets and Second and Carr Streets. These are so-called four-dump stations. That is to say, four different spaces are assigned to freight for groups of railroads. From July 1 to October 31, 1927, these stations delivered to the railroads 58 per cent and 53.4 per cent, respectively, of the freight received on the same day. At smaller off-track stations at Second and LaSalle Streets and Seventh and Cerre Streets, one-dump stations, only 38.8 per cent and 36 per cent, respectively, of the freight received was delivered to the railroads the same day. At smaller stations it is often necessary to make combination loads for two or more railroads. Discontinuance of some off-track facilities will make crews now working there and motor equipment serving them available to the selected stations.

The St. Louis Shippers' Conference Association urges that existing off-track stations have been in use for a sufficient time to have become endowed with the status of "usual places of delivery" which can not be abandoned without first consulting public rather than carrier interest; that the transfer companies are the equivalent in law of connecting common carriers and that the failure or refusal of respondents to absorb the charges of the Central or of "any transfer company operating as a common carrier between St. Louis and East St. Louis and performing station service at off-track stations in St. Louis, at least, when such charges are as low as, or lower than, those of the Columbia" is violative of sections 2 and 3 of the act; that respondents should have first applied for a certificate of public convenience and necessity before attempting to abandon existing off-track stations and that their failure to do so is sufficient ground for discontinu-

ing the investigation and suspension proceeding and requiring the proposed schedule to be canceled.

The weight to be given the first contention depends primarily upon the individual concept of public interest. There is here no proposal to abandon all station facilities. Respondents propose merely to reduce the number of them and the only bearing that public interest has on this question is whether the facilities proposed to be kept in operation will be reasonably adequate to meet the needs of the shipping public. The contention that the transfer companies are connecting common carriers is grounded in the main upon Tariffs Embracing Motor-Truck or Wagon Transfer Service, 91
122 I. C. C. 539, at 547. But in that case we specifically said that motor-truck or wagon-transfer companies performing terminal services for and on behalf of carriers are not common carriers subject to the act. We did find that the service performed by them is subject to our jurisdiction but that is quite a different thing. This contention presupposes the right of any transfer company to set up an off-track station, hold itself out as a "common carrier" at rates which will meet those of other transfer companies, and compel recognition by the carriers. That construction of the law has already been rejected.

The question whether an application for a certificate of public convenience and necessity under section 1 (18) is to be regarded as a condition precedent to the abandonment of a number of off-track stations, as here proposed, is novel. Counsel relies upon the facts (1) that the Terminal Railroad Association has been found to be an extension of the rails of the proprietary lines, including these respondents, C., R. I. & P. Ry. Co. v. B. & O. R. R. Co., 113 I. C. C. 681; (2) that the operation of these off-track stations and the haulage to and from them is a substitution for and the equivalent of the service rendered through and over the rails of the Terminal; (3) that paragraph 3 of section 1 defines the term "railroad" as including "freight depots", and (4) that paragraph 18 of section 1 requires that no portion of a line of railroad or the operation thereof may now be abandoned unless and until there has been an application for a certificate of public convenience and necessity. Counsel cites Public Convenience Application of C. of G. Ry., 117 I. C. C. 354, and states that we there held that the abandonment of a freight station not only fell within our jurisdiction but that a carrier has no option other than to lay its plan before us for a determination of whether or

not the proposal is in the public interest. In that case application was made by the Central of Georgia for a certificate of public convenience and necessity authorizing a revision of alignments and grades on its Columbus-Birmingham line and to construct new track incidental thereto. Among the improvements to be made was a viaduct from the west side of the right of way of the Southern at Childersburg, Ala., to the east side of Fourteenth Street and as an incident of that new construction the freight and passenger station was to be relocated at Fourteenth Street. After issuance of the certificate we were requested to authorize construction of the station at a different location and the certificate was amended accordingly. Action by us was requested and our jurisdiction was not challenged. That case is not authority for a finding that abandonment of a station, not on track, which will require no removal or change of tracks is covered by the provisions of paragraph (18) of section 1. In R. R. Comm. v. Southern Pac. Co., 264 U. S. 331, the Supreme Court held that
123 construction of new station facilities requires a certificate of public convenience and necessity from us in those instances which involve major projects entailing a substantial and expensive extension or relocation of the main tracks or lines of interstate carriers and substantial expenditure of capital. See also Oklahoma Corporation Commission v. A., T. & S. F. Ry. Co., 101 I. C. C. 647, 650, 651. Counsel for respondents, on oral argument, pointed out that they do not own any of the stations to be abandoned, that they are merely recognized as "off-track stations" in the tariffs, and that the trucking companies could, if they desired, sell them tomorrow and go out of the business. Does the act contemplate that we can prevent a carrier from discontinuing a facility, the discontinuance of which it is powerless to prevent? We think not. We could not deal with the trucking companies because they are not common carriers subject to the act.

The question of adequacy of existing facilities is capable of definite proof. Here we are called upon to determine an unknown quantity because time and experience, the best tests of adequacy, can afford it no light. Respondents have endeavored to show by mathematical calculation that the proposed facilities will be adequate. These computations we have analyzed and criticized. There is evidence of periodic congestion but nothing which shows delays more serious than are to be expected at any other freight station at rush periods of the day or at busy seasons of the year. Facilities built to accommodate abnormal conditions would lie idle and consti-

tute waste in periods of normalcy. Compare Logan Coal Co. vs. Pennsylvania R. Co., 154 Fed. 497, 502.

One practice prevails, however, in connection with the operation of off-track and out-track stations in St. Louis and East St. Louis which should be corrected. Prior to 1917 the stations in East St. Louis closed at 5:30 p. m. and the St. Louis stations at 5 p. m. After the race riot in that year the hour for closing East St. Louis stations was advanced to 4:30 p. m. and no change was made in the hour of closing at St. Louis. The result is that outbound freight is accepted at St. Louis a half-hour after the on-track stations on the east side are closed. This difference in closing hours is the apparent cause of many of the periodic delays referred to in the record, because the bulk of the out-bound freight is delivered to the off-track stations in the afternoon.

The stations selected by respondents are entitled to a fair trial and it is not to be assumed that respondents will fail to augment them if and when they fail to meet the reasonable demands of the shipping public. The carriers under their tariffs are bound to make deliveries of freight at St. Louis
124 and under the conditions now obtaining many deliveries must be made through off-track stations. These facilities they are bound to provide to a degree necessary reasonably and adequately to serve the shippers. However convenient it might be for shippers to have off-track stations dotting the city they are not entitled as a matter of right to more stations than are necessary to meet their reasonable needs. Beyond that point the shippers would be receiving more than they have a lawful right to receive and the carriers would be wasting their revenues. It is also to be borne in mind that under a properly balanced scheme of allowances which will make direct-delivery service competitive in fact with off-track station service much of the tonnage now moving in the latter will be diverted to the former and will tend to prevent or relieve any congestion which might at times occur.

Direct Delivery, Constructive Station

The practice of arranging for the so-called direct delivery of freight at St. Louis was originated in 1870 by the Louisville & Nashville, then exclusively an east-side line, in order to meet competition of the St. Louis, Iron Mountain & Southern, a west-side line. It gradually, for competitive reasons, spread to the other east-side lines and covered additional origin territory until it is now a general practice. Under the arrangement any recognized trucking company, listed in the

tariffs, receives freight at on-track stations in East St. Louis and hauls it to the consignees' places of business. From the moment the freight is received at East St. Louis until it passes a constructive point at the west end of Eads Bridge the trucking company acts as the agent of the carrier. Thereafter it acts as the agent of the consignee. The constructive station is not a physical station. No stop is made there. No handling of the freight occurs. It is merely, as stated, a dividing line between carrier and consignee agency and responsibility. On outbound shipments the situation is the same in principle.

It will be seen, therefore, that the plan results in store-door delivery and receipt in a modified form. Modified only in that instead of the carrier bearing the full haulage costs, they are divided at the constructive station. In the St. Louis Terminal Case, 34 I. C. C. 453, decided June 23, 1915, an investigation on our own motion, we considered the lawfulness and propriety of the plan. In speaking of the imaginary or constructive character of the stations we said:

> Transportation is a very practical public service, and the laws for its regulation were intended to deal with actual rather than with constructive or imaginary things. And yet, while not sanctioning such a practice, we are not to be understood, in the light of a record relating only to one community, as condemning the constructive acceptance and delivery of freight at a wholly constructive terminal solely because there is no physical station there nor any acceptance or delivery of traffic in a physical sense.

In respect of the limitation of the service to designated transfer companies we said, at page 466:

> The undefined point, if comparable with anything physical, must therefore be regarded as taking the place of a station for less-than-carload traffic and a team track for carload traffic. In either case the right to use this constructive service is limited to shippers who approach the constructive terminals through the agency of transfer companies designated by the carriers. They may not, with their own vehicles, go to the constructive stations to deliver or receive their traffic. In other words, the right of a shipper to have an east-side line extend its service to and from these undefined points depends upon his willingness to employ the carriers' agent to haul his traffic between these points and his store door. If he employs a transfer company designated by the carrier

he may have the service; if he uses his own vehicle the service is denied to him. The result is an unjust discrimination which must be corrected.

No order was entered in that proceeding but it was stated that the carriers would be expected to adjust their practices so as to remove the "unjust discrimination." The readjustment consisted, apparently, in adding a few more transfer companies to the tariffs but the allowance and service has never been and is not now thrown open to the drays or trucks of the general public. Nor does this record indicate that it should be. The transfer companies which handle this business are agents of the carriers for a portion of the haul. They are vested with the responsibility of collecting freight charges on inbound shipments and on prepaid outbound shipments. The carriers have the right to insist upon the employment of responsible concerns. The theory that unjust discrimination arises because of the fact that all shippers can not "approach the constructive terminals" with their own vehicles, loses sight of the continuity of the service and the fallacy of unloading and reloading traffic at the constructive point merely to satisfy the purely technical demands of equality. It can not be successfully urged that the carriers can not restrict their agencies up to the constructive point, because that haulage is done for them. Beyond that point all shippers have recourse, without discrimination, to the services of the designated companies and, as will be hereinafter shown, the drayage charges to all are equalized. In the cases[7] in which we have considered the question, of store-door delivery the plan was never condemned, as such, and the difference in the modified plan here under consideration in so far as the identity of the hauling agencies is concerned is theoretical, rather than real.

126 There is no question that the service is beneficial and desirable. It benefits the shippers and receivers of freight because it saves, at St. Louis, an additional station handling and thus expedites movement. It benefits the carriers at St. Louis because it relieves them of payment for the additional station handling. If, for example, the 1926 inbound tonnage had all been handled in direct delivery, instead of through off-track stations the savings in allowances paid to transfer companies would have amounted to $324,-

[7] Casassa v. P. R. R. Co., 24 I. C. C. 629; Anacostia Citizens Asso. v. B. & O. R. R. Co., 25 I. C. C. 411; Washington, D. C., Store-door Delivery, 27 I. C. C. 347; and Merchants & Manufacturers Asso. v. B. & O. R. R. Co., 30 I. C. C. 388.

060.80. Similar savings on 1926 outbound tonnage would have been $1,080,439.32. These computations are based on the difference between the present off-track station and direct-delivery allowances.

It is true that a constructive station is not a point of actual delivery where tariffs can be posted or which otherwise complies with the letter of section 6. Yet neither that section, nor any other section of the act specifically authorizes or condemns a constructive station and it is obvious that such stations were not in contemplation because, until quite recently, St. Louis has been the only point at which the practice has been in effect. No inconvenience results from the inability to post tariffs at the constructive stations. Tariffs are on file at the on-track stations at East St. Louis and at on-track and off-track stations in St. Louis

There are other conditions which might make the constructive-station plan improper and unlawful. Among these would be the practice of locating them so as to favor particular shippers. But where, as here, the station is located at the first and natural point of contact with the St. Louis side of the river; where the service is beneficial and desirable in the public interest; where its continuance is requested by municipal, carrier, and shipping interests; and where it will result in a saving to the carriers in the expense of delivery, there is no reason for condemning it because of vices which might exist but do not. The physical situation at St. Louis lends itself peculiarly to the constructive-station plan. The constructive station used by all lines, being at the first point of contact with the St. Louis shore, is so located that by providing service to and from it the carriers are performing the minimum of the transportation service which they hold themselves out to perform, and yet are performing the full service to which they are lawfully obligated by their published tariffs. There is no attempt on their part, by groups or individually, to reach out with the constructive station, beyond their lawful obligations, for the purpose of securing tonnage, one from the other. A constructive-station service operated purely as a convenient, expeditious, and economical means of completing a contract of carriage merits approval. The same service, if operated solely as a competitive measure to
127 secure business from a rival carrier more favorably located in respect of certain traffic, may become burdensome to the carriers and to commerce as a whole. No question is here presented as to our power to require the establish-

ment of a constructive station against the wishes of the carriers. The service is here and we are asked only to approve or disapprove its continuance. We are thus dealing with a practical question which should be met in a practical way so as to cause as little disturbance as possible in existing conditions. Lack of direct control over a desirable plan should not condemn it when there is no contention or proof that unlawful or improper practices obtain. To find otherwise would be tantamount to saying that that over which we have no direct control is for that reason unlawful. If unlawful practices should develop at St. Louis or at other points we could condemn the plan either on complaint or on investigation on our own motion.

The next question to consider is the amount of the allowances proposed for this service. Respondents and protestants all express a desire for our views on this and other subjects here concerned to the end of arriving at satisfactory terminal arrangements. Responsive to this desire this phase of the case will be discussed at length. As stated, the proposed allowances are 2 cents for less-than-carload traffic and on fruits and vegetables, in carloads, and 1 cent on other carload traffic, by respondents other than the Alton, and 5 cents and 3 cents, respectively, by the latter line. The theory of respondents is that a direct-delivery allowance should be no more or no less than is necessary to equalize the disability of the east-side lines in not having on-track stations on the west side. They place the constructive station in the same category as off-track and on-track stations in St. Louis, assume that between that point and places of business within St. Louis the drayage charges will be equalized, and allow just enough in addition to the equalized charge to compensate for the additional haul between the constructive station and the on-track stations in East St. Louis. Thus, where the drayage charge between places of business and any on-track or off-track station in St. Louis is 6 cents, the drayman hauling goods from and to East St. Louis would receive 8 cents, 2 cents from the railroad and 6 cents from the shipper. There would be no change in the drayage charge paid by the shipper and the east-side lines would be paying only the amount necessary to theoretically move their stations to the west bank of the river. At this point it should be stated that it is the general practice of St. Louis draymen to equalize their charges as between all on-track and off-track stations in St. Louis on the one hand and traders' places of business on the other hand. That is to say, the charge for a given class of

merchandise from or to a place of business in St. Louis to or from any on-track or off-track station is the same, gen-
128 erally speaking. Whether this practice will continue in the event that the direct-delivery plan becomes a really potent factor can not be ascertained. For example, a large wholesale hardware concern has a warehouse directly across the street from the constructive station. This concern has a contract with a transfer company which hauls for it exclusively. At present it uses the direct-delivery plan and pays its draymen something in addition to the 2 cents received from the railroads. The manager of this concern admitted that in the event the direct-delivery allowance is increased he will make a new contract with the dray company designed to reflect to his company the benefit of the increase. It is very probable that other concerns located near the constructive station would make similar special contracts. But these circumstances are not sufficient, in and of themselves, to condemn the proposed increased allowance of the Alton. If the constructive station is not unlawful or improper, and if the allowances paid for the movement between it and the railroad stations on the east side are based on cost of service plus a fair profit, contiguity to such a station is a natural advantage which may lawfully redound to the benefit of a consignee or shipper to the same extent as contiguity to an on-track or off-track station. Charges to shippers should, of course, be the same for like and similar service and respondents propose to require a bond from designated transfer companies that such equality be maintained.

Obviously, any direct-delivery allowance which would more than offset the disability of the east-side lines would result in a highly dangerous competitive situation. An allowance so high that it affords an opportunity for competing draymen to shade their charges to consignees, entirely aside from any question of legality, would have to be met by the west-side lines through establishment of similar allowances or through store-door delivery. An allowance too low would not put the east-side lines on a competitive basis with west-side lines on traffic as to which shippers have an option as to service. All of the railroads sense the delicacy of this situation and all are anxious to reach a proper result. The Alton has proposed the increase in the allowances because it feels that the present allowances and those proposed by the other respondents are too low to attract tonnage to the plan.

The proposed allowance of 2 cents on less-than-carload freight is the same as that paid for the past 19 years by the

Baltimore & Ohio, Pennsylvania, Big Four, and Wabash. The Southern paid 2 cents up to September 2, 1918, 2.5 cents to September 2, 1919, 3 cents to September 1, 1920, 4 cents to July 1, 1922, 3.5 cents to November 15, 1922, and has paid 3 cents since that date. The Louisville & Nashville, Mobile & Ohio, Illinois Central, and Nickel Plate paid 2 cents
129 from February 29, 1908, to January 2, 1918. On that date it was increased, except by the Illinois Central and Nickel Plate to its present amount, 2.5 cents. The Illinois Central on September 15, 1920, and the Nickel Plate on November 5, 1920, also increased the allowance to 2.5 cents, its present amount. From 1908 to the present time, the allowance for off-track station service has increased from 5 cents to 13.5 cents, or 170 per cent, whereas the direct-delivery allowance has remained the same for four lines, increased 50 per cent for one line, 25 per cent for four other lines, and is now proposed to be held by all lines, other than the Alton, to its 1908 figure. Stated another way, the difference between off-track station and direct-delivery allowance in 1908 was 3 cents, and the proposed difference, except by the Alton, is 10 cents. Question immediately arises whether if 3 cents was a proper spread in 1908, a spread of 10 cents is proper at this time.

Other interesting comparisons may be made as to the adequacy of the proposed allowances of 2 cents, less than carload, and 1 cent on carload traffic. On inbound traffic handled through off-track stations the proposed contracts provide an allowance of $2.60, as compared with an allowance of $2.31 on outbound traffic. The 29-cent difference is designed to cover the extra station service incident to inbound traffic. Some station service is required on outbound business but it is not substantial and does not compare unfavorably with the incidental service necessary to be performed by the drayage companies handling shipments in direct delivery. The record shows that, although drayage charges vary between on-track and off-track stations in St. Louis, on the one hand, and traders' places of business in St. Louis, on the other hand, a fair average would be 6 cents per 100 pounds. This, added to the 2 cents to be allowed by the railroad for the service between on-line stations in East St. Louis and the constructive station, makes a total of 8 cents, or 3.55 cents under the allowance for handling from off-track stations in St. Louis to on-track stations in East St. Louis. There is no question that

the latter movement can be made under more favorable circumstances because of the concentration of tonnage.

Again, when certain of the east-side lines established the 7-cent allowance referred to on carload traffic from on-track stations in East St. Louis to off-track station warehauses in St. Louis, the west-side lines met the competition by establishing an allowance of 4 cents from on-track stations on the west side. Apparently they did this because they felt that their 4 cents was just as attractive as the 7 cents offered by the east-side lines and that the 3-cent difference fairly reflected the difference in the service. They now contend that 1 cent reflects such difference on carload traffic.

130 In 1915 about 50 per cent of the inbound less-than-carload traffic destined to St. Louis moved in direct-delivery service, as compared with 3 per cent in 1926. Protestants and the Alton insist that this falling off is due to the inadequacy of the allowances. Respondents have a different explanation. It seems that two of the transfer companies operating off-track stations in 1926, the Central and Fidelity, did not engage in direct-delivery service to any substantial extent and used that fact as a talking point in soliciting outside draymen to patronize their off-track stations. The Columbia was, therefore, compelled to abandon any solicitation of this business as a competitive measure. Respondents hope, by eliminating competition in the operation of off-track stations, to wean the traffic back to direct delivery. In addition to the Columbia, respondents have arranged for six other transfer companies to handle the business.

There is much controversy as to just what service should be covered by this direct-delivery allowance and there is presented in the question a strange admixture of legal and practical considerations. The freight stations of the east-side roads are located along the east bank of the river in a line probably a mile and a half in length. The Eads Bridge strikes East St. Louis about in the center of the line. If a consignee has inbound shipments on several of these platforms and desires to handle them in direct-delivery service through the constructive station his drayman must call at each station and pick up the shipments. If he does not desire direct delivery he has only to wait until the shipments are moved to one of the inbound off-track stations of the transfer companies, where he can receive them in one load. The converse is true in respect of outbound business.

As a matter of law the receiver of less-than-carload freight is obligated to load it from the station platform to his vehicle. This naturally necessitates movement of the vehicle to and from the platform. Respondents urge, therefore, that any allowance they may lawfully make must compensate the shipper only for the additional haul from the constructive station on the west end of Eads Bridge to the East St. Louis end of the bridge because that is the only additional service that the drayman is performing as a substitute for the railroad. In other words they contend that they can not, through this allowance, put the shipper's dray any closer to or in any different position in respect of the east-side on-track stations from that which would obtain if he was receiving freight from or delivering freight to on-track stations on the west side.

But so long as there are universal off-track stations in St. Louis at which freight for all railroads can be received or delivered at one location and so long as the stations on
151 the east side are individual it is idle to attempt to convince a drayman that in contemplation of law the hauls necessary in the pick-up and delivery service are the same on both sides of the river. Draymen are not interested in theories. They know that they can collect the same amount from the shipper or consignee for the movement from and to the off-track stations as from and to the constructive station. If the haul between the constructive station and the on-track stations on the east side presents actual difficulties greater than the theoretical difficulties and if the allowance paid by the railroads does not compensate for the actual difficulties the draymen not only will not solicit the service but will exert all their efforts to avoid it. Traffic managers for several large shippers testified that their draymen have told them that they can not profitably engage in the business at the allowance of 2 cents.

If the direct-delivery service is to grow as is hoped by the carriers, the balancing or comparison of theoretical services should be with the most favorable from the draymen's standpoint and not with the least favorable. That is to say, computation of the cost of performing the service should proceed on the theory or assumption that the east-side stations are combined or universal for the purpose of receipt and delivery just as the off-track stations in St. Louis. The average distance traversed and the average time spent in canvassing the various stations over a test period should be de-

termined and the cost of performing the service should be computed with those averages as a basis. Certainly the service will not become competitive with the off-track station service and will not be desirable or available to the shipping public if it must be performed at a loss to the draymen. Nor will the shippers use it if they have to make up to the draymen the loss suffered by the latter in the hauls between the constructive and on-track stations.

The methods followed at present in respect of according the direct-delivery service are very lax. As stated, no outbound and only 3 per cent of the inbound business is moving in direct-delivery service. A consignee has the right to file standing orders with the east-side roads calling for the service, but no system is in vogue whereby the freight of that consignee is segregated for loading on separate trucks. The practice at East St. Louis stations is to move freight direct from the car to the waiting trailers of the transfer companies without regard to whether it is to move in direct-delivery service or to off-track stations. The result is that the freight is mixed in the trailer and the small amount of direct-delivery freight is lost sight of. Unless it so happens that it is loaded near the rear of the trailer and dropped off en route it goes along to the off-track station and is delivered from there. In the latter event the transfer company bills the railroads for the station allowance.

132 Clearly there will have to be much improvement in this respect if the direct-delivery business is to increase. Arrangements should be made whereby a shipper's order for direct delivery will mean just that. It is small wonder that the service has fallen into virtual decay. If it has one predominant thing in its favor it is the simplification of the handling of freight from car door to store door. It is largely a matter of solicitation but the solicitation should not and can not in fairness be expected to come from a transfer company operating off-track stations and which must, in the nature of things, sacrifice its own financial interests if it encourages the business. The carriers should also take immediate steps to segregate direct-delivery tonnage from off-track station tonnage at East St. Louis freight stations. If they continue to stow it in a trailer with off-track station freight, the transfer company will continue to give it depot service and collect the depot allowance. It is not practical to do otherwise. It is no excuse to point out that the meager volume of tonnage does not justify such segregation. The tonnage will always be

meager if it does not receive the direct service which it is designed to receive.

It is also patent that the service will not be used to any appreciable extent unless it is attractive to shippers and to the draymen, especially the latter. But any allowance may become the gravest sort of a vice if it affords a means of manipulating charges to shippers. For this reason no one can say with certainty that any arbitrary figure will or will not equalize the west-side and east-side lines, or that it will cover the cost of the extra service. The service between the on-line stations in East St. Louis and the constructive station is a service performed for and on behalf of the carrier. If it is performed by an independent agent that agent is entitled to reasonable compensation which would cover the cost of operation plus a fair profit. At that figure the service would be attractive. Below it, it would be shunned by everyone in position to take it or leave it. The cost of this service is demonstrable and if the allowance is made to include only cost plus a fair profit there would be no opportunity and no incentive for any shading down of charges to a particular consignee. Then, too, if the allowance is based upon cost of operation plus a fair profit and a similar plan is followed as to the off-track station allowances the two services would be competitive in reality and not merely in theory or in hope. A figure which will represent cost plus a fair profit may be arrived at by determining the difference between the costs of haulage to and from off-track stations in St. Louis and to and from on-track stations in East St. Louis. Such a figure would also reflect the equalization so earnestly advocated by the west-side lines.

133 Position of Outlying Industrial Districts

The off-track and on-track stations in St. Louis through which less-than-carload freight is handled are all located east of Twelfth Street. Since 1904 the northwestern section of the city has had a rapid industrial development. This section is served by a belt line of the Terminal Railroad Association and by the Wabash. There are 108 industries on the rails of the Terminal. The number of industries on the Wabash is not shown. The less-than-carload tonnage of 27 of those industries averages 425,880 pounds outbound, and 146,875 pounds inbound, daily, and it is estimated that the total less-than-carload tonnage daily is about 1,000,000 pounds, outbound and inbound. The distances from the plant of the United Drug Company, one of the larger industries in this

district, to the west-side stations, on track and off track, range from 5.5 miles to 10 miles. The distances from the extreme western end of the district to such stations range from 10.1 miles to 14.6 miles.

There are no stations, off track or on track, in this district for merchandise freight. When the district was in its first stage of development an arrangement was made whereby mixed lots of merchandise were handled by the Terminal to its Tenth Street station at $2 per car. The charge was increased to $3 per car in 1914, to 1.5 cents per 100 pounds, minimum $4 per car in 1918; to a minimum of $5 per car in 1919, to 5 cents per 100 pounds, minimum $8 per car later in 1919, and to 7 cents per 100 pounds, minimum $11 per car on August 26, 1920. On July 1, 1922, the charge was reduced to 6.5 cents per 100 pounds, minimum $10 per car. A witness for the United Drug Company testified that the service is little used at present because of the increased cost and the delay incident to it. Industries located in this district have private tracks for the placement of carload freight. On less-than-carload freight in lots of 8,000 pounds or more from or to one railroad, they receive trap-car service the cost of which is absorbed by the line-haul carrier. On mixed lots of less-than-carload freight for more than one railroad or for lots of less than 8,000 pounds for one railroad, they use the service of trucks or drays. Their costs in this respect are higher than the cost of downtown industries due to the longer hauls. The witness who acted as spokesman for the northwest district expressed the view that the carriers should either establish an on-track station in this district on the rails of the Terminal or an off-track station centrally located. He also desired the establishment of a constructive station in respect to traffic to and from this district so located as to equalize the costs of drayage with those borne by downtown shippers. In other words they ask that the railroads be required to bear
134 the additional transfer costs incurred by reason of the greater distance of these industries from the downtown section. They point out that they are located on the rails of the Terminal, which line acts as the agent of its proprietary lines, and that the obligation of the carriers as to delivery, constructive or actual, is not met by the maintenance of stations at least 5.5 miles distant from the district.

Testimony was also given on behalf of the so-called southwestern industrial district, located on an average about 4 miles from the downtown district. This district is served mainly by the Missouri Pacific and the Frisco, and also by the Manu-

facturers Railway. St. Louis rates apply on both carload and less-than-carload traffic. Carload traffic is delivered at private industry or team tracks. On less-than-carload traffic the industries have free trap-car service on lots of 8,000 pounds or more for one railroad. Smaller lots are handled by dray or truck to and from downtown stations. The less-than-carload tonnage of 23 firms in the district, a small percentage of the total number, amounts to about 4,500,000 pounds outbound and 1,000,000 pounds inbound, monthly. The Terminal Railroad Association does not serve this district. The shippers there located desire the establishment of an off-track station at Park Avenue and Southwest Avenue.

This inquiry was instituted primarily to determine the propriety of allowances for existing services or the abandonment of existing facilities. It did not contemplate requiring the establishment of additional or new facilities in districts not at present served with off-track stations. The establishment of off-track or constructive stations in St. Louis is merely the completion by the east-side lines of their contracts for transportation. So long as they afford adequate and reasonable facilities for the delivery of freight it is not within our province to dictate the particular location of such facilities. In respect of any obligation growing out of the location of certain of these industries on the Terminal it should be borne in mind that the Terminal itself is a delivering agency. Nothing here said is designed to discourage the establishment of merchandise stations, on track or off track, in any locality where the carriers in their judgment feel that the traffic is sufficient to warrant such facilities. Whether, in the event such stations are established, the carriers should pay the extra drayage costs through an increase in the allowances, is questionable. One witness for the city of St. Louis, a consulting engineer well versed in the conditions affecting freight deliveries in that district, expressed the opinion that these outlying districts should pay a premium over the St. Louis rates if off-track stations are to be located in such districts. He
135 based this opinion on the fact that their disadvantages in respect of drayage costs are largely compensated by lower taxes and property values. Certainly any arrangement whereby carriers might make allowances on traffic to one group of shippers greater than those on traffic to another group of shippers within the same switching district would be open to serious question under the undue prejudice and unjust discrimination provisions of the act.

Conclusions

We have seen that there is nothing violative of the law in the proposal of the carriers to restrict the hauling for and on their behalf to a single transfer agency. Nor is the act violated by the continued maintenance of a constructive station at the west end of the Eads Bridge, as proposed. In the latter connection it may be well to add that athough the maintenance of a constructive station as a sole facility for the receipt and delivery of freight could not be deemed a compliance with the requirements of section 6, we see no reason why the maintenance of such a facility as an alternative form of delivery is a violation of that section, or of any other, so long as it does not result in unlawful discrimination or preference. Likewise this record is not convincing that unreasonable or inadequate service will result from or that public interest will be adversely or unreasonably affected by the proposed limitation in the number of off-track stations to be operated for the respondents, particularly if the suggestions herein made in respect of direct-delivery service are carried out.

But there are certain features of respondents' proposals which we are not prepared to approve at this time. Among the most important of these is the complete lack of any showing that the allowances to be paid for these trucking services are based upon a cost study. On the contrary, in spite of the comparative ease with which such a study could have been made, we find that the allowances proposed for off-track station service represent nothing more than a vague sort of compromise. Moreover, there is a complete lack of balance as between those allowances and those proposed for the direct-delivery service.

Accordingly the proceedings will be held open in order to permit respondents to enter into a cost study with the view of determining the costs of the various services to be performed in connection with off-track station receipt and delivery, interchange between railroads, and in direct deliveries. If desired, one of our representatives will assist in the preparation of formulæ to be used in these studies.

136 In their brief of exceptions, and on oral argument, respondents ask permission to put their proposed plan in operation for a period of 90 days before making any cost study. They point out that it is a part of their plan to restrict railroad hauling, except through constructive stations, to one transfer company and to reduce the number of off-

track stations now in operation. They argue, therefore, that a cost study made under existing conditions could not possibly reflect the situation at it will be under their proposed plan. They insist, further, that some of the savings which will result should be made immediately available to them; for example, discontinuance of the present allowances of 7 cents by east-side lines and 4 cents by west-side lines for the transfer of carload freight. Those contentions have considerable force, but, under all the circumstances, we are not persuaded that it would be to the best interests of the respondents to put their plan in effect prior to the cost study. At present two transfer companies are functioning and establishment of the proposed plan might spell the doom of one of them, leaving only one company with whom the carriers could deal. There is, to say the least, a possibility that a careful cost study will open the way to a reduction in the present allowances. If such reductions should not be acceptable to the one company equipped to do the hauling there would be the danger of a tie-up in the receipt and delivery of freight while the respondents would be negotiating to take over the property for their own operation. Although it is probably true that a study made at this time will not show costs with the exactitude possible under complete operation of the plan, the considerations mentioned are of too great importance to be ignored. The record shows that the Columbia is handling more than 90 per cent of the business, and its costs should certainly be fairly representative. If respondents desire, they may discontinue the Columbia stations proposed to be abandoned, while the cost study is in progress, so that any saving resulting from concentrating its tonnage will reflect itself. We will also permit respondents to amend their tariffs in respect of the 7-cent and 4-cent allowances to which we have referred, and so as to permit discontinuance by the Missouri Pacific and Frisco of off-track station user, as proposed. Otherwise, the cost study should proceed at once. When it shall have been completed the proceeding will be set down for further hearing for the purpose of introducing them in evidence along with supporting data and testimony, subject to cross-examination by interested parties. At that time the carriers should be prepared to advance the figures deduced from such studies as their proposed allowances for our approval or amendment.

137 Eastman, Commissioner, concurring in part:

I agree that the constructive-station plan of delivery is of public advantage and that under the circumstances here existing it is not unlawful. I agree that the carriers have a

legal right to employ a single transfer company as their agent to do the trucking to and from the off-track stations. I agree, although with more hesitation, that certain of the existing off-track stations may be abandoned without the obtaining of certificates of public convenience and necessity under section 1 (18). I also agree that we should not approve the suspended schedules at the present time, that it is highly desirable that the proposed cost studies should be made, and that they can be required under our powers of investigation. However, I would go further and find definitely that the suspended schedules have not been justified in their present form.

The limits of our authority over what is proposed should be made clear. As indicated above, I believe that the carriers may lawfully, so far at least as the statutes which we administer are concerned, employ as their agent in the performance of any of their functions any person or corporation that they see fit to employ. Nor do I believe that we have power to control the amounts which the carriers see fit to pay for such services, so long as such allowances are not used as an indirect means of granting preferences to shippers or do not interfere with the proper performance of transportation duties. It is true that in section 15a we are directed to fix rates which will enable the carriers to earn a fair return "under honest, efficient and economical management," and that under this and other provisions of the act we have authority to investigate the character of carriers' management. If we find that the management is in any respect dishonest, inefficient or uneconomical, we can report the facts and express our views about them, and we can also make due allowance for such management in fixing the level of rates, fares, and charges. But the act does not make uneconomical, inefficient, or even dishonest management in itself unlawful nor give us any direct power to reform it. In so far as it is reflected in rates or service we have power to correct its results, and dishonest management is no doubt subject to attack under other laws, but, so far as our direct authority is concerned, I believe the above statement to be correct.

In this case I think that we may properly find that the proposed schedules have not been justified; but as a preliminary to stating the reasons for that belief I shall first express certain views upon what is proposed. Such expressions of opinion, whether or not we can back them up by action, are clearly within our authority. Respondents perform a very important part of their freight service in St. Louis and East

St. Louis through the agency of trucking companies.
138 They now propose to give a single trucking company the monopoly of this business. With the thought that the service can best be performed through a single agency I have no quarrel. Very likely it is correct. But in creating a monopoly for this purpose over which they themselves have no direct means of control respondents are incurring a serious and quite unnecessary danger. While the contract is for a limited term of years, it is probable that within that period the agencies which now are capable of competing with the Columbia for the business will by reason of the exclusive contract cease to exist, at least as formidable competitors, with the result that negotiations for a new or extended contract will be prosecuted under conditions much less favorable to respondents than now exist. There is no excuse in the railroad business for the creation of such separately owned and parasitic monopolies. If there is need for the entrusting of certain terminal or other services to a monopoly, it should at least be brought under direct railroad control, and in my opinion statutory provision should also be made for public supervision of its affairs. Manifestly in the situation here presented such a monopolistic trucking business should be carried on, directly or indirectly, under the auspices and control of the Terminal Railroad Association, which is the common terminal agent of respondents in the district and which they own and control.

Nor is this all that can be said about this proposed arrangement. It appears that it has been conceived and negotiated in part under the auspices of officers of respondents who had and have a direct financial interest in the Columbia Terminals Company or an affiliated company. I do not at all agree with the majority in passing lightly over this episode. It was without excuse whatever the outcome of the negotiations. But what was that outcome? The evidence here shows that although the contract with the Columbia was not hastily prepared, but only after months and even years of prior consideration, it is defective in many of its provisions.

No attempt was made to secure competitive bids for the monopoly privilege, but instead it was presented to the Columbia without contest. The initial allowances to that company are higher than the present charges of the Central Transfer Company. The provisions for subsequent reductions are so loosely drawn that their efficacy is uncertain. For example, changes in the allowances are to be based upon cost of service, "including profit," without any indication of what, if any, limitations there are to be upon "profit"; the ascertain-

ment of costs and resulting allowances is to be made by a committee made up in equal parts of representatives of the carriers and of the Columbia, without any clear indication of what is to happen if the members of this committee
139 fail to agree; and it is further provided that one-half of any reductions in cost shall accrue to the benefit of the Columbia, regardless of whether the latter is responsible for these reductions and without any apparent consideration of whether or not this arrangement is an unnecessarily liberal spur to efficient operation. Moreover, the contract is so drawn that no additional off-track stations can be provided without the consent of the Columbia, even if those specified prove inadequate. Furthermore, although a cost study could, as the majority state, have been made with "comparative ease" and there has been no lack of time for such a study, the monopoly is to be conferred without any such precaution and, as the majority also state, a "complete lack of balance" is proposed between the allowances provided for the off-track station trucking and those provided for the constructive station trucking, with the result that the latter service will be unjustly and unnecessarily discouraged. Other criticisms of the contract could be made. Plainly what has been done, so far as this contract is concerned, has been improvident and inconsistent with proper standards of management.

These, however, are matters about which we are free to express our views but over which we have, in my opinion, no direct authority. I come now to the question of whether and to what extent we have means of control over what is proposed.

In section 1 (3) of the act, "transportation" is defined to—

include locomotives, cars and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in conjunction with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Clearly this includes such service as would be performed for respondents by the Columbia under the contract in question. By section 1 (4) it is made the duty of every common carrier subject to the act engaged in the transportation of passengers or property to "provide and furnish such transportation upon reasonable request therefor." In section 1 (10) the term "car service" is defined to—

include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains by any carrier by railroad subject to this Act.

And by section 1 (11) it is made the duty of every carrier by railroad subject to the act "to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect" thereto. I take it that in view of the prior definition of "transportation" the term "car service" is broad enough to include the service to be performed for respond-
140 ents by the Columbia; and it follows, also, I believe, that we may condemn as unlawful and require to be canceled any tariff provisions which prevent or seriously threaten the performance of respondents' duties under paragraphs (4) and (11) of section 1.

Here it is shown in the majority report that the allowances proposed in these tariff provisions are of such a nature that, as indicated above, the constructive station or so-called direct-delivery service will be unduly discouraged. In view of the importance to the public of this service under all the circumstances here existing, an arrangement which will have this result can not be found to be consistent with respondents' duty under section 1 (11). Furthermore, it appears that the off-track stations are not now owned by respondents and that this situation will continue under the proposed contract. They will be owned and manned by the Columbia. So complete is this control that it is stated in the majority report that the trucking companies could, if they desired, sell the present stations to-morrow and go out of the business. While this might not be true under the proposed contract, so long as it continued in effect, it would again be true upon the expiration of that contract. It seems to me that such a situation is wholly inconsistent with the duties of respondents under both paragraphs (4) and (11) of section 1, and that to safeguard the service which they are under obligation to furnish to the public they should certainly own and control these off-track stations themselves. Curiously enough, in 1925 respondents seem unanimously to have reached this same conclusion, but for some reason these good intentions went into the discard. There is something anomalous in the ownership and control of a railroad station facility by a separately owned concern not directly subject to public supervision. And while there may be no serious measure of danger in such a situation so long as the trucking service is

not monopolized but is subject to the restraining influence of competition, the danger to the public would become serious if the monopoly contemplated by the proposed contract is created.

Under all the circumstances it seems to me that the proposed tariff provisions in their present form constitute a sufficient threat to the proper performance of respondents' lawful duties under section 1 so that we would be warranted in requiring their cancellation.

McManamy, Commissioner, dissenting:

In certain important respects I do not agree with the conclusions reached by the majority. Certainly the scope of this proceeding is not restricted to the propriety of the proposed arrangement to the exclusion of any consideration of the necessity for additional terminal facilities at St. Louis. This is a general investigation instituted upon our own motion after a joint petition for such an investigation had
141 been filed by the St. Louis Chamber of Commerce, the St. Louis Shippers Conference Association, individual shippers, transfer companies, and the Chicago & Alton Railroad. That petition not only described the arrangement which a majority of the carriers proposed to put into effect, but it averred that the existing situation had been unsatisfactory for many years. It was pointed out that a suspension proceeding would be limited in scope, and a complete investigation was urged as necessary for us to "permanently settle this controversy and enable the business interests of St. Louis and East St. Louis to know definitely the kind and character of service to which they are entitled and will be given." Our order instituting the investigation was broad enough to include every phase of the terminal situation at St. Louis, as shown by the following quotation therefrom:

That the Commission, upon its own motion, enter upon an investigation into * * * the places at which and manner in which freight is so delivered or received off the rails of said carriers within said switching limits, the establishment, maintenance and operation of off-line stations for the receipt and delivery of freight by such carriers * * * with a view to making such findings and orders in the premises and prescribing such just, reasonable and lawful rates, charges, rules, regulations and practices in the premises, and taking such other action, as the facts and circumstances may appear to warrant; * * *

Under paragraph (4) of section 1 of the interstate commerce act it is the duty of every common carrier engaged in transporting passengers or property to provide and furnish such transportation upon reasonable request therefor, and paragraph (3) of the same section defines transportation as including—

all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Certainly this includes stations, storage warehouses, and trucks or other vehicles used for the purpose of conducting transportation.

Carriers ordinarily provide on-track stations and facilities for the discharge of their duty to shippers under section 1. If carriers serving St. Louis choose to not provide on-track facilities either of their own or through the Terminal Railroad Association, they must provide a lawful substitute which will be adequate to care for the needs of shippers. This may be done by making delivery in either one or more of the following ways: (1) Through adequate and conveniently located off-track stations; (2) through constructive stations available to all who desire to use them, as hereinafter explained; and (3) by a system of store-door delivery.

142 The record indicates that the existing off-track stations have often been congested and they are not located so as to properly care for the needs of rapidly growing districts, particularly the northwestern and southwestern sections of the city. Certainly it is not adequate service to provide no facilities whatever for handling less-than-carload tonnage amounting to 1,000,000 pounds per day in districts located from 5.5 to 14.6 miles from either on-track or off-track stations. In my opinion, the carriers should be required to establish such additional facilities as are necessary to care for the needs of these districts.

Not only do the majority fail to give any consideration to the need for additional facilities, but they sanction the abandonment of some of the existing off-track stations. It seems to me clear that the remaining off-track stations will not be adequate unless a large part of the less-than-carload tonnage that has been handled through the off-track stations

is diverted to the constructive stations. There is no reasonable expectation for that, however, unless and until the constructive station allowance is placed on a competitive basis with the off-track station allowance and the constructive station is thrown open to all who desire to use it. It is shown that in 1926 the allowance to the transfer companies owning the off-track stations was $1,404,500.12 greater than it would have been if the freight had been handled through the constructive station. With such a handicap it is not difficult to understand why the constructive station handles but 3 per cent of the traffic. It is my view that no facilities should be abandoned until the allowances have been revised on the basis of the cost study and a fair trial thereafter has demonstrated that the diversion of traffic to the constructive station will permit of such abandonment.

In the St. Louis Terminal Case, 34 I. C. C. 453, the constructive-station practice was condemned in so far as the allowances were restricted to certain transfer companies as an unjust discrimination. We there said:

These restrictions and limitations in our judgment result in definite discriminations that are unlawful. In actual practice the east side lines at their expense cart the inbound traffic a part of the way to the store doors of particular shippers and also at their expense cart the outbound traffic of particular shippers part of the way to their rail ends in East St. Louis. The transfer companies contend that this service is open to the whole public. In a measure this is true. But however the service may be analyzed we come finally to see that a substantial number of shippers must pay to third persons selected by the carriers a cartage charge for handling their traffic to and from these constructive stations, and they are thereby compelled to let their own horses, wagons, and similar equipment stand idle.

143 Nevertheless, we are now told that the carriers have never brought their practice into conformity with that decision, and the majority propose to let them continue the present practice. In fact it is now proposed to limit the use of the constructive station to 7 transfer companies compared with 22 at the time of the previous case and a large number thereafter. The principal reason advanced for denying the allowance to all shippers alike is that the transfer companies collect the freight charges for the carriers. No reason is apparent why the carriers could not collect their charges at the on-track stations as is the usual custom. That there is no

insurmountable difficulty in the way is shown by the fact that the schedules under suspension propose to allow any shipper to do his own hauling and receive the allowance on fruit and vegetable traffic. The restriction of the allowance on other traffic to certain transfer companies in effect denies the use of the constructive station to those who have provided their own vehicles and desire to use them as well as those who have contracts or established relations for the use of other transfer companies. This is not only an unjust discrimination between shippers but might well be condemned as an unreasonable practice.

Notwithstanding the unanimous opposition of the shippers represented in this proceeding, the carriers are seeking to eliminate all competition in the transfer of freight to and from off-track stations. This common-carrier service is to be performed by a single company which the carriers state and the majority agrees can not be controlled by the carriers and is not subject to our control. It may be that we are without authority to prevent this, but to my mind it will not be for the best interests either of the shippers or the carriers to be placed to such a large extent at the mercy of this independent transfer monopoly.

Farrell, Commissioner, dissenting in part:

With the views of the majority concerning constructive stations I am unable to agree. In this case it is found that the maintenance of a constructive station at the west end of Eads Bridge in St. Louis as an aid to the direct receipt and delivery of traffic from and to shippers and consignees is not unlawful and, as at present operated, does not result in unlawful practices. According to my view, however, provisions of the interstate commerce act, particularly provisions included in sections 1 and 6, impose upon common carriers subject to the act duties in connection with the receipt and delivery of traffic which are not performed and, as a practical matter, can not be performed at constructive stations.

By section 1 the carriers are required to provide facilities which will enable them to receive traffic for transporta-
144 tion from consignors at points of origin and to deliver traffic after it has been transported by the carriers to consignees at points of destination, and it is apparent, I think, that neither of these duties can be performed at a constructive station, except conditionally. Such a station is

usually, if not always, an imaginary line extended across a public street, and of course the traffic could not be unloaded and reloaded in the street. It is therefore clear that, as a practical matter, neither receipt nor delivery by the carrier, separately from the truck in which the traffic is transported and the driver of the truck, can take place at such a station. It therefore follows, necessarily, that a constructive station can never be used, except in connection with a special agreement entered into by and between a common carrier on the one hand and a shipper or consignee on the other hand; that is to say, the parties mentioned must agree to use the same truck and employ the same truck driver in connection with the transportation to and from and from and to the constructive station, notwithstanding that the former transportation is covered by the interstate commerce act while the latter is not.

In said section 6 it is provided that carriers shall print and keep open to public inspection schedules showing their rates and charges for transportation and post copies of such schedules for the use of the public in two conspicuous places in each depot, station, or office of such carriers where freight is received for transportation, while section 20 requires carriers to issue receipts or bills of lading for traffic delivered to them for transportation, and it goes without saying that none of these duties can be performed at a constructive station.

According to my view, a constructive station is simply a creature of the imagination which enables carriers subject to the act on the one hand and shippers and consignees who are not subject to the act on the other hand to divide between them the expense of transporting traffic by truck from and to the depots of the carriers to and from the places of business of the shippers and consignees, either after it has been transported by the carriers by railroad to, or before it is so transported from, such depots, and under the circumstances described it seems to me that an effort to regulate under the act the divisions for which the carriers are to be responsible, for the purpose of preventing them from becoming rebates in fact and from causing unjust discrimination and undue prejudice as between different shippers and consignees, would be an attempt to accomplish the impossible. For the latter reason, if for none other, it is my opinion that the use of constructive stations by common carriers subject to the interstate commerce act should be condemned. I am authorized to

state that Commissioner Aitchison concurs in the views herein expressed.

145 Appendix

This Agreement made and entered into this..... day of....., 19...., between the..... Rail.....Company, a .....corporation, hereinafter called the "Railroad," and the..... Company, hereinafter called the "Contractor."

Witnesseth That:

Whereas: The Railroad desires to establish in St. Louis, Missouri, a certain number of "off-track" stations to afford more efficient service to the public, and purposes to designate such stations, when selected, as railroad stations to and from which freight may be delivered and received, and at or through which bills of lading and other documents may be issued by the agent of the railroad, in the same manner and with the same expedition as at its "on-line" station; and

Whereas, The Railroad has selected the following "off-track" freight stations as indicated by the location described, namely:

Eleventh & Spruce Streets.....St. Louis, Missouri
Broadway & Spruce Street.....St. Louis, Missouri
Broadway & Chouteau Avenue..St. Louis, Missouri
Second and Carr Streets.....St. Louis, Missouri
Sixth & Spruce Streets.....St. Louis, Missouri
Broadway & Carr Street.....St. Louis, Missouri
Fourth & Valentine Streets....St. Louis, Missouri

And Whereas, The Railroad desires to have the Contractor perform the service of handling certain less than carload freight between the "on-line" freight station of the Railroad located in East St. Louis, Illinois, and the said "off-track" freight stations located in St. Louis, Missouri, selected and designated by the Railroad, and also between the said "on-line" freight station of the Railroad, and various "on-line" freight stations of other railroads located in East St. Louis and/or St. Louis, and:

Whereas, the Contractor desires to handle such less than carload freight and to furnish the designated "off-track" freight stations, forces and equipment of whatever kind may be necessary to carry out this agreement, and

Whereas, It is hereby declared to be the purpose of the parties to this agreement to carry out in good faith, the above

plan in accordance with the following terms and specifications.

Now, therefore, subject to the Railroad's right, which is hereby reserved, to employ other means for transportation of the class of traffic herein covered, it is agreed by and between the parties hereto as follows:

(N. B.—It is agreed that the term "on-line freight station" applies to the established freight stations, either in St. Louis or East St. Louis, located on the railroad tracks of one or more railroad companies, and accessible by railroad freight cars, and that the term "off-track freight stations" applies to stations and warehouses suitable for receiving and protecting freight, but which are not reached by the tracks of any railroad company, but can be reached only by vehicles suitable for operation on the streets of a city.)

The Contractor Covenants and Agrees:

1. To provide and maintain at its sole cost and expense, but to the satisfaction of the Railroad, adequate station facilities herein term "off-track freight stations" for handling outbound less than carload freight as provided for herein
146 and which shall be located as follows, in accordance with the selection and designation by the Railroad:

Eleventh & Spruce Streets.....St. Louis, Missouri
Broadway & Spruce Street.....St. Louis, Missouri
Broadway & Chouteau Avenue..St. Louis, Missouri
Second & Carr Streets.....St. Louis, Missouri

2. To provide and maintain at its sole cost and expense, but to the satisfaction of the Railroad, adequate freight station facilities herein termed "off-track freight stations" for handling inbound less than carload freight as provided for herein and which shall be located as follows, in accordance with the selection and designation by the Railroad:

Sixth & Spruce Streets.....St. Louis, Missouri
Broadway & Carr Street.....St. Louis, Missouri
Fourth & Valentine Streets.....St. Louis, Missouri

3. To provide as required by the Railroad, and to maintain at its sole cost and expense, but to the satisfaction of the Railroad,

(a) adequate forces and equipment for the prompt movement of freight between the designated "on-line" freight station of the Railroad in East St. Louis and the "off-track"

freight stations, herein designated; and between the said "on-line" freight station of the Railroad and the "on-line" freight stations of the various other railroads in St. Louis and East St. Louis in the manner provided for in the tariffs of the Railroad.

(b) to place suitable equipment for handling inbound freight at the locations designated by the Railroad at the designated "on-line" freight station of said Railroad as and when called for by the Railroad.

(c) to place equipment loaded with outbound freight at the "on-line" freight station of said Railroad at the locations designated by the Railroad.

(d) to load and unload the freight into or from the equipment of the Contractor at each and every one of the designated freight stations of the Railroad covered by this agreement and at the sole cost and expense of the Contractor.

The Contractor Further Covenants and Agrees:

4. On every working day of said Railroad, in accordance with notice from said Railroad, to haul promptly from the designated "on-line" freight station of the Railroad, all less than carload freight that is ready for delivery to the Contractor, and within the hours designated by the Railroad for such delivery, and to handle such less than carload freight to the designated "off-track" freight stations, and to effect, as far as it may be possible, prompt delivery to consignees.

5. To deliver promptly to the said "on-line" freight station of the Railroad, all outbound freight received at the designated "off-track" freight stations of the Railroad prior to the hour set for closing the "off-track" freight stations for receipt of freight to be forwarded the same working day as received.

6. To observe the embargo notices and other regulations issued by the Railroad for the purpose of restricting the acceptance of outbound freight at "off-track" stations.

7. To act as Agent of and to represent the Railroad at the designated "off-track" stations in the relations between the Railroad and the public in respect to business handled under this agreement.

147 8. To observe the published tariffs and regulations of the Railroad, governing the collection of all charges on inbound freight, when such charges follow shipments, and to

likewise promptly collect all charges from consignors on outbound freight billed prepaid, all of said charges to be collected within the time specified by the Railroad and in conformity with the laws, rules, regulations and tariffs of the Railroad, it being the intent of the Railroad under this agreement, to apply at its "off-track" freight stations, the same rules and regulations, in its relations with the public, as contemporaneously apply at the "on-line" freight station or stations of the Railroad in the same district.

9. To assess and collect the storage charges in accordance with the tariffs of the Railroad on less than carload freight not removed from the "off-track" freight stations of the Railroad within the free time provided by said tariffs.

10. To promptly remit to the Railroad, all charges collected on inbound and outbound freight and all storage charges collected from the owners of the freight, and to handle the accounting thereof in accordance with the requirements of the Railroad.

11. To furnish receipts to consignees for charges collected and to keep on file a copy thereof, such receipt to serve as a proper receipt for the freight delivered and to bear notations on both the original and duplicate, exactly recording the exceptions, if any, taken by the consignee or his agent as to the condition of such freight upon delivery.

12. To receipt to the shipper for outbound shipments of freight and to furnish to the Railroad, the consignor's shipping ticket with manifest, observing the Railroad's regulations with respect to the handling of such documents.

13. To deliver inbound freight consigned "shipper's order notify," only upon surrender of the original bill of lading properly endorsed in accordance with the requirements of the Railroad, and to preserve such surrender "order" bill of lading on file until otherwise directed by the Railroad.

14. To maintain and preserve its books and records, covering operations provided for herein in such manner as may be prescribed by the Railroad, and to permit a full and complete examination thereof at all reasonable times by authorized representatives of the Railroad.

15. To keep accurate account of all payments, including overpayments made by consignees or consignors on freight handled, to the end that prompt settlements may be made with consignees or consignors in such amounts as may be due

them, and to pay to the Railroad, all amounts due the Railroad, including any "unrefundable" amounts of any character, after allowing a proper time to locate the consignee or consignor to whom such amounts may appear to be due.

16. To be responsible to the Railroad for all inbound freight while same is in possession of the Contractor, such responsibility to begin when delivery of the freight is made to the Contractor, either

(a) Upon its vehicles, or

(b) When unloaded upon the platform of the "on-line" freight stations of the Railroad and adjacent to the driveways used by vehicles of the Contractor in loading, and immediately upon being accepted by the representative of the Contractor, and to continue to be responsible until such freight is delivered to the rightful consignee or connecting railroad.

17. To be responsible to the Railroad for all outbound freight as soon as such freight has been received from the consignor at any one or more of the "off-track" stations designated herein, such responsibility to continue until delivery has been made by the Contractor to the "on-line" station of the Railroad, and the freight accepted by the Railroad.

148 18. To comply with all laws, ordinances or conditions imposed upon Contractor, Contractor's employes or upon the Railroad, in connection with the handling or transporting of freight provided for in this agreement.

19. To comply with the Workmen's Compensation Laws of the states of Illinois and Missouri, to pay all premiums thereon, and to pay all claims that may be due under such statutes.

20. To be solely responsible for, and to indemnify the Railroad against, and save it harmless from, all liability, damages, loss, cost or expense of any kind, arising from or by reason of any of the following:

(a) A breach of any of the covenants or conditions to be performed by the Contractor hereunder.

(b) For injuries to or death of the Contractor's officers or employes or for damage to or loss of its or their property, or for injuries to or death of third parties or for loss or damage to their property, when occasioned by or incident to the performance of the services covered by this agreement.

(c) For loss of or injury or damage to freight while in the possession of the Contractor. The term "damages" shall include physical, market and other species of loss, damage, injury or depreciation for which the Railroad is liable in the carriage of freight.

21. To carry adequate insurance with companies satisfactory to the Railroad, to fully protect the Contractor and the Railroad from any and all loss or damage by fire to freight handled under this agreement; to pay the premiums on such insurance; to keep such insurance in effect throughout the term of this agreement, and to file the policy or policies with the Secretary of the Terminal Railroad Association of St. Louis.

22. To furnish, contemporaneous with the execution, and maintain in effect throughout the term of this agreement, a corporate surety bond adequate in amount, satisfactory to the Railroad, to insure the prompt and faithful performance by the Contractor of all and singularly the terms and conditions of this agreement, the cost of such bond to be paid by the Contractor.

23. To consolidate, discontinue or abandon, within a reasonable time, upon the written request of the Committee of railroad representatives, appointed as provided for herein, any of the station facilities covered by the terms of this agreement. If such facilities are consolidated, discontinued or abandoned, due consideration shall be given to adjusting the accounts so that they shall reflect the proper debits or credits.

24. To secure the approval and consent of said Committee of railroad representatives before making any increase in the freight station facilities of the Contractor existing as of the date of the execution of this agreement.

25. To place itself, its agents, servants or employes, at the service of the Railroad, either during the term of or after the termination of this agreement, to assist said Railroad in the defense of claims or suits for loss or damage occurring during the term of this agreement.

26. To receive, in full satisfaction for its services for the first ninety (90) days this agreement is effective, the rates named in Clause twenty-nine (29) hereof, and, thereafter, such rates as may be determined under the plan provided in Clauses subsequent hereof.

(a) A Supervisory Committee, to be constituted by the Railroad and other railroad companies using the same "off-track" freight stations in St. Louis herein designated, shall have the general supervision of the business and service to be conducted under this agreement, except as herein otherwise expressly provided.

149 Said Supervisory Committee shall have power, from time to time, to promulgate reasonable or proper rules and regulations for the conduct of the business or service to be conducted hereunder or any part thereof, and all such rules and regulations shall be observed and carried out by the Contractor.

Such Supervisory Committee shall have the power to act by or through any sub-committees or special committees, or by or through any other representatives of the railroads that it may from time to time elect or appoint.

Wherever in this agreement the term "Committee" or the phrase "committee of railroad representatives" is used, such term or phrase shall be understood to refer to said Supervisory Committee unless otherwise expressly indicated.

The Railroad Covenants and Agrees:

27. To designate the freight stations specified in paragraphs numbers 1 and 2 of this agreement as the only "off-track" freight stations of the Railroad in the city of St. Louis for the handling of inbound and outbound less than carload freight for account of said Railroad, except as modified by Article 23.

28. To deliver to the Contractor at the "on-line" freight station of the Railroad located in East St. Louis, all such less than carload freight as the Railroad may desire handled other than in railroad freight cars between the "on-line" freight station of the Railroad located in East St. Louis and the "on-line" freight stations of the various railroads located in East St. Louis and St. Louis.

29. To pay to the Contractor for the service rendered under this agreement, for the first ninety (90) days it is in effect the following rates:

(a) On less than carload freight from the "on-line" freight station of the Railroad located in East St. Louis, to any one or more of the "off-track" freight stations herein designated located in St. Louis, including the delivery of said less than carload freight to the rightful consignee at said

"off-track" station or stations, at the rate of 13 cents per 100 pounds, or $2.60 per ton.

(b) On less than carload freight received from consignors at any one or more of the "off-track" freight stations designated herein, located in St. Louis and transported under the terms of this agreement to the "on-line" freight station of the Railroad located in East St. Louis, at the rate of 11.55 cents per 100 pounds, or $2.31 per ton.

(c) On less than carload freight between the "on-line" freight station of the Railroad located in East St. Louis, and any "on-line" freight station of the various railroads also located in East St. Louis, at the rate of 7.7 cents per 100 pounds, or $1.54 per ton, said rate and charges to be finally assumed in the manner authorized by the current tariffs of the Railroad.

(d) On less than carload freight between the "on-line" freight station of the Railroad located in East St. Louis and any "on-line" freight station of the various railroads located in St. Louis, at the rate of 9.1 cents per 100 pounds, or $1.82 per ton, said rate and charges to be finally assumed in the manner authorized by the current tariffs of the Railroad.

The rates stated in sub-clauses (a), (b), (c), and (d) of this clause 29, shall be the maximum rates hereafter to be charged by the Contractor or paid by the Railroad for the respective classes of service performed by the Contractor during any six months' period referred to in clauses 33 to 36 (both inclusive) of this agreement.

150 The Railroad Further Covenants and Agrees:

30. The Supervisory Committee will designate or appoint a special committee of three representatives of the railroads to act in conjunction with not more than three representatives of the Contractor, in determining fair and equitable rates to be allowed for the service rendered by the Contractor hereunder, but subject to the approval of said Supervisory Committee.

The Contractor's books of account, and all accounting data in reference thereto covering the services rendered by it under this agreement shall be kept in accordance with a uniform system of accounting, and classification of accounts in respect to all business handled for the Railroad herein and other railroad companies using the same "off-track freight stations" in St. Louis herein designated; and the Supervisory

Committee, hereinabove provided for, shall at all times have the power to prescribe or approve the system of accounting and the classification of accounts thereunder which shall be observed by the Contractor in the making of its accounting records of the business handled under this agreement.

31. To give prompt consideration to any request of the Contractor for permission to increase or decrease the facilities or the equipment of the Contractor referred to in this agreement.

The Railroad and The Contractor Mutually Covenant and Agree That:

32. Due consideration shall be given by both parties to any and all improvements, devices or arrangements to improve or reduce the cost of the services provided for herein and to adopt such changes, devices, etc., as are agreed upon by the parties hereto.

33. During the readjustment period of ninety (90) days from the date of this contract, the rates herein specified shall continue without change, but as soon as practicable and not later than ninety days after the date of this agreement, the Committee appointed by the Railroad as provided for in Clause thirty (30) hereof, and the representatives of the Contractor, acting together in good faith, shall make a study of the cost of the services provided for in this agreement, including profit, to determine the rates to be allowed the Contractor for services rendered under this agreement, after such rates shall have been approved by the Supervisory Committee. Such study shall include also a determination of the cost figures necessary for use in connection with services performed, or to be performed by transfer companies other than the particular Contractor, with whom this agreement is made. In making the study, a test period of sufficient length, to be representative of average operating conditions and fair to both parties, shall be used.

34. The rates determined by the method provided in Clause thirty-three (33) above, to be paid to the Contractor after the first ninety (90) days of the life of this agreement for the services rendered under this agreement, shall remain in effect for a period of six (6) months from the expiration of the said ninety-day period provided in Clause thirty-three (33).

35. The Committee designated in Clause thirty-three (33) above, unless otherwise agreed upon between the Contractor

and the Railroad, shall periodically, at the end of the six months referred to above, and at the end of each successive six months period, agree upon and designate the rates to be allowed the Contractor for services rendered, the purpose of this provision being that the Railroad shall receive the benefit of any revisions which will reduce the cost to the Railroad and that the Contractor shall secure the benefit of any revisions which may be necessary to insure a reasonable profit to the Contractor, at intervals of approximately six months.

151 36. In revising the rates to be paid the Contractor after the first six months period shall have elapsed, and at subsequent six month periods, the rates named in Clauses twenty-nine (29), forty-one (41) and forty-two (42) hereof, as revised under the provisions of Clauses thirty-four and thirty-five (34 and 35) hereof, shall be reduced by deducting from each of the said rates one-half (½) of the cents per hundred pounds or the cents per ton, that the average rate per 100 pounds or per ton for expense of rents, taxes and operation, is less than the average rate per 100 pounds or per ton for such expenses as determined by the previous study, the purpose of the above formula being to insure the mutual interest of the Contractor and the Railroad in reducing the costs of operation.

The right is reserved to the railroads, at any adjustment period, to so adjust the rates as to preserve a proper relationship.

37. Any disagreement, or misunderstanding, or difference of opinion with regard to the intent, meaning or proper construction of this agreement shall be submitted to a board of three (3) disinterested arbitrators to be selected as follows: The party desiring arbitration shall select one arbitrator and in writing shall notify the other party of such selection and of the points upon which arbitration is desired, whereupon the other party shall, within ten days after receipt of such written notice, notify the other party in writing of its selection of an arbitrator. The two arbitrators so chosen shall, within ten (10) days thereafter, choose a third arbitrator. In the event such other party fails to select an arbitrator within such ten (10) day period, the arbitrator first selected shall request a Judge of the U. S. District Court having jurisdiction in either of the cities of East St. Louis, Illinois, or St. Louis, Missouri, to select the second arbitrator, and the two arbitrators so selected shall choose a third arbitrator.

In the event the two arbitrators so chosen shall fail to agree upon the third arbitrator, such Judge shall be requested by either of such arbitrators to appoint the third arbitrator. The decision of such arbitrators, or the majority thereof, shall be made in writing within twenty (20) days after the hearing of the controversy. Copies of such decision shall be delivered to and, thereupon, shall be binding and final upon each of the parties hereto. All expenses of such arbitration shall be apportioned by the arbitrators between and paid by the parties hereto in proportion fixed by said arbitrators. It is not the purpose or intent of this article to apply as to charges which may be assessed for any of the services contemplated under this agreement.

38. This agreement shall be binding upon the legal representatives, successors or assigns of the parties hereto, provided, however, that the Contractor shall not assign this agreement without the written consent of the Railroad.

39. Provided that this agreement is not required to be modified or abrogated at any time by an order of a federal or state commission having jurisdiction of the subject matter herein covered, or by a decree of a court of final resort, it shall be in effect and binding for a period of two (2) years from the date hereof.

The Railroad shall have the right to renew this agreement in all of its terms and provisions for an additional term of two years, and such right of renewal may be exercised by the Railroad by giving to the Contractor written notice of its desire to exercise such right at any time within a period of twenty-two months from the date of this agreement.

The Railroad and The Contractor Further Mutually Covenant and Agree That:

40. The Railroad and the Contractor are mutually interested in expediting the handling of less than carload freight to and from St. Louis and East St. Louis for the benefit of the shippers and receivers of said freight and, there-
152 fore, they will cooperate as between themselves and also with other railroads and with the shipping public of these two communities, in fostering and encouraging the consignors and consignees located in St. Louis, to adopt the direct delivery plan of handling the less than carload freight covered by this agreement, between their respective places of business and the "on-line" freight station of the Railroad in East St. Louis.

41. The Railroad will pay to the Contractor at the rate of 2 cents per 100 pounds or 40 cents per ton, and/or as provided for in the railroad tariff, for handling less than carload freight between the "on-line" freight station of the Railroad located in East St. Louis and a constructive point of delivery, which is hereby designated as the west-end of the roadway of the Eads Bridge in St. Louis, when such freight is handled under the direct delivery plan to or from the warehouse or place of business of the consignee or consignor, and when such payment is authorized by the current tariffs of the Railroad, and the Contractor agrees to accept the rate of 2 cents per 100 pounds or 40 cents per ton for such service to the point designated, and to act as the agent of the Carrier between the "on-line" freight station in East St. Louis and the constructive delivery point above described, but no farther, and to act as the agent of the consignee or consignor between the said constructive delivery point and the warehouse or place of business of the consignee or consignor in St. Louis, and the Railroad reserves the right, and the Contractor acknowledges such right, to arrange a similar plan of direct delivery with two or more other transfer companies.

The Railroad and the Contractor Also Mutually Covenant and Agree:

42. That the railroad will pay to the contractor at the rate of one cent per hundred pounds on all carload traffic with the exception of fruits and vegetables, in which case the rate will be two cents per hundred pounds, and/or provided for in the railroad tariff for the handling of carload freight between the team tracks of the railroad located in East St. Louis and a constructive point of delivery which is hereby designated as the west end of the roadway of the Eads Bridge in St. Louis when such freight is handled under the direct delivery plan to or from the warehouse or place of business of the consignee or consignor, and when such payment is authorized by the current tariffs of the railroad, and the contractor agrees to accept the aforesaid rates for such service to the point designated and to act as the agent of the carrier between the team tracks of the railroad located in East St. Louis and the constructive delivery point above described, but no farther, and to act as the agent of the consignee or consignor between the said constructive delivery point and the warehouse or place of business of the consignee or consignor in St. Louis.

In Witness Whereof the parties hereto have caused this agreement to be executed the day and year first above written.

..... RAILROAD COMPANY
By .....
Its .....

.....COMPANY
By .....
Its .....

By the Commission.

(Seal) GEORGE B. McGINTY,
Secretary.

A True Copy.

GEORGE B. McGINTY,
Secretary.

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153 (Defendants' Exhibit 4.)

Interstate Commerce Commission.

No. 19594[1]

Transfer of Freight Within St. Louis and East St. Louis, By Dray and Truck for and on Behalf of Railroads.

Submitted June 24, 1931. Decided July 27, 1931.

1. Allowances for off-track and interchange services at and between St. Louis, Mo., and East St. Louis, Ill., embodied in contract between agent of respondents and Columbia Terminals Company, approved.

2. Allowances for direct-delivery service from East St. Louis to St. Louis proposed by the Chicago & Alton Railroad Company found not justified. Suspended schedules embodying such allowances required to be canceled.

3. Allowances for direct-delivery service from and to the same points proposed by the other respondents found justified.

4. Former report, 155 I. C. C. 129.

E. C. Kramer, D. P. Connell, Guernsey Orcutt, W. A. Northcutt, E. A. Smith, and H. S. Harr for east-side respondents generally; Silas H. Strawn and Frank H. Towner for

[1] This report also embraces Investigation and Suspension Docket No. 2934, Off-Track Station and Constructive Receipt and Delivery of Freight at St. Louis, Mo., and East St. Louis, Ill.

Chicago & Alton Railroad Company; C. S. Burg, John F. Connors, A. B. Enoch, A. H. Kiskaddon, H. H. Larimore, Walter McFarland, M. G. Roberts, and L. H. Strasser for west-side respondents generally; John F. Connors for Chicago & Eastern Illinois Railway Company.

Glendy B. Arnold for St. Louis Chamber of Commerce; W. E. Rosenbaum for St. Louis Shippers' Conference Association; Hausner & Versen and Paul Y. Versen for Association of Team and Truck Owners of St. Louis, Eilermann Transfer Company, Geo. R. Jansen Transfer Company, and M. L. Kenney Transfer Company; R. W. Woolley and William H. Schaumberg for Central Transfer Company; and John T. Money for Columbia Terminals Company.

Report of the Commission on Further Hearing.

Porter, Commissioner:

Exceptions were filed to the report proposed by the examiner and oral argument was had. Our conclusions differ somewhat from those which he recommended.

The general nature of these proceedings is indicated by their titles. The history and description of the services under consideration are fully set forth in the prior report, 155 I. C. C. 129, and will not be repeated here. In that report we found:

That the proposal of carriers, other than the Chicago & Alton, to employ a single transfer company for the operation of off-track stations and the haulage between such stations and the on-track stations of the railroads, and in the interchange of freight between railroads, is not violative of any provision of the interstate commerce act.

154 That the proposal of carriers, other than the Chicago & Alton, to reduce the number of off-track stations in St. Louis from 12 to 7, and at East St. Louis from 3 to 2, will not be harmful to the public interest or result in unreasonable and inadequate service.

That the present and proposed maintenance of a constructive station at the west end of Eads Bridge as an aid to the direct receipt and delivery of freight from and to shippers and consignees is not unlawful and, as at present operated, does not result in unlawful practice.

We declined, however, to approve the allowances proposed to be paid for these services on the ground that they were not based upon a cost study, saying on page 162:

* * * in spite of the comparative ease with which such a study could have been made, we find that the allowances proposed for off-track station service represent nothing more than a vague sort of compromise. Moreover, there is a complete lack of balance as between these allowances and those proposed for the direct-delivery service.

Accordingly the proceedings will be held open in order to permit respondents to enter into a cost study with the view of determining the costs of the various services to be performed in connection with off-track station receipt and delivery, interchange between railroads, and in direct deliveries. * * *

When it shall have been completed the proceeding will be set down for further hearing for the purpose of introducing them in evidence along with supporting data and testimony, subject to cross-examination by interested parties. At that time the carriers should be prepared to advance the figures deduced from such studies as their proposed allowances for our approval or amendment.

Accordingly, the carriers proceeded to conduct a cost study and two further hearings, hereinafter referred to as the second and third hearings, respectively, were had at which evidence regarding that study and the proposals resulting therefrom was received.

The cost study was placed in charge of a general traffic committee composed of representatives of both east-side and west-side lines. That committee appointed a cost committee to conduct the study, composed of eight accounting officers of as many different carriers. Each respondent was given an opportunity to suggest members for the cost-study committee. It appears to have been selected by unanimous action of all the respondents and to have been made up of men well qualified for the work.

The cost study was based upon a carefully devised formula, in the preparation of which the committee was assisted by a statistical analyst on our staff. The formula was introduced in evidence. Except with respect to the method provided for obtaining the portion of the cost of direct-delivery service to be borne by the railroads, hereinafter discussed, no criticism of the formula appears in the record. Briefly, it provides for the recording, during a test period, of the time consumed and the tonnage handled in each class of service and for the

building up of a productive vehicle-hour cost by an ex-
155 amination of the operating costs of the different transfer companies. This vehicle-hour cost is applied to the time consumed in each service to ascertain the total cost for that service and the result is divided by the tonnage to produce the cost per ton. The formula also provides for the addition to actual costs of a fair profit, and suggests that "the cost of reproduction, less depreciation, of the properties owned, which are used in handling freight traffic by tractor, truck, or dray, be adopted as a basis for applying a per cent to obtain the amount of fair profit."

The time and tonnage data were collected for the period from September 9 to 14, 1929, both inclusive. The costs ascertained were based upon an analysis of the operating expense accounts of the transfer companies for the year ended July 31, 1929.

The various services, together with their abbreviated designations used in the record and in this report, are as follows:

Service	Abbreviation
Involving off-track stations:	
St. Louis outbound to west-side rail stations	City O B West
St. Louis outbound to east-side rail stations	City O B East
St. Louis inbound from east-side rail stations	City I B East
Interchange services:	
Between east-side rail stations	East to East
Between west-side rail stations	West to West
Between east-side and west-side rail stations (Trans-Mississippi service)	Trans-Miss.

Direct-delivery service.

In the direct-delivery service the cost study covered operations of the Columbia Terminals Company, the McMahon Transfer Company, an East St. Louis company controlled by the Columbia, and four other transfer companies which had been engaged in that service. In the off-track station services the operations of the Columbia and McMahon companies were studied, and in the interchange services those of the Columbia only were studied. The Central Transfer Com-

pany, the only company other than the Columbia operating off-track stations in St. Louis, was not included, that company having declined to permit a study of its operations.

On January 17, 1930, the cost-study committee submitted to the traffic committee a report containing the final results of its work. This report shows the actual cost per ton ascertained for each service and also suggests allowances for each service, made by adding to the actual cost the amounts found necessary to produce various rates of return on
156 the present-day value (cost of reproduction, less depreciation) of the property and equipment used in the service. In the case of the Columbia the committee used a valuation made by an appraisal company in which certain rates of depreciation had been applied to reproduction costs to ascertain present-day values. The committee adopted the same rates of depreciation in determining operating costs. The Columbia contended that these rates of depreciation were too low, and at their request the cost committee submitted with their report to the traffic committee a separate statement showing the result obtained by determining operating costs at the higher rates of depreciation claimed. The table below shows, for the off-track and interchange services, the present allowances, the actual composite costs, and the allowances calculated to produce 8, 10, and 12 per cent return, as found by the cost-study committee, and the corresponding costs and allowances produced by determining operating costs at the rates of depreciation contended for by the Columbia:[1]

Service	Present rates	"A"				"B"			
		Actual composite costs	Rates produced by applying following per cent of profit to present values			Actual composite costs	Rates produced by applying following per cent of profit to present values		
			8	10	12		8	10	12
City OB West	$2.00	$1.59	$1.90	$1.98	$2.06	$1.63	$1.95	$2.02	$2.10
City OB East	2.41	1.65	1.97	2.05	2.12	1.68	2.00	2.08	2.16
City IB East	2.70	2.26	2.67	2.77	2.87	2.28	2.69	2.79	2.89
East to East	1.64	1.27	1.38	1.41	1.43	1.30	1.42	1.44	1.47
West to West	1.71	1.37	1.49	1.52	1.54	1.40	1.52	1.55	1.58
Trans-Miss.	1.92	1.38	1.50	1.53	1.55	1.41	1.53	1.56	1.59

"A"—As found by the cost-study committee.

"B"—Produced by using as operating costs the rates of depreciation claimed by the Columbia Terminals Company.

[1] When costs and allowances are referred to herein in cents they are per 100 pounds, and when in dollars they are per ton of 2,000 pounds.

Before further discussion of the cost study it should be stated that the information upon which the cost-study committee based its conclusions was obtained from the various transfer companies with the distinct understanding that it was not to be used as evidence in such manner as to furnish information to their competitors injurious to their interests. Practically the only information with respect to the study which was put into the record through direct testimony was that already outlined; that is, the composition of the committee, the formula, and the final results reported. Such details of the study as are to be found in the record are those developed upon cross-examination.

The failure to include the Central Transfer Company in the study has already been explained. At the previous hearing this company was shown to have handled about 8.5 per cent of the total tonnage of authorized transfer companies. At that time it participated but slightly in the direct-delivery service. At the second hearing its volume of business was estimated to have increased to from 10 to 15 per cent of the total and was conceded to be greater than that of all the companies included in the cost study, except the Columbia.

What proportion of this was in the direct-delivery
156a service does not appear. The record does not show whether or not the inclusion of the operations of this company would have materially changed the results.

The evidence indicates that the cost-study committee departed in certain particulars from the formula. For example, in studying the operations of the Columbia it discarded the prescribed forms of driver's daily work reports and substituted a form of work report regularly used by that company. This form did not supply all of the information called for by the formula, but instructions were issued intended to provide during the test period the additional data required. The formula provides that the time of a tractor or other vehicle traveling light shall be allocated to the service that occasioned such light movement. A witness for the Chicago and Eastern Illinois testified that in a number of instances light movements were not charged in accordance with this rule, and also that nonproductive time was not handled in accordance with the formula. In computing the time by which the productive vehicle-hour cost is to be multiplied to ascertain the vehicle costs assignable to an individual service, the formula provides for the elimination of certain non-productive time, such as time consumed in waiting for orders, taking gasoline, and making minor repairs. The witness recited various in-

stances in which these deductions had not been made. This would tend to increase the cost figures for the service in which the vehicle was engaged at the time. Whether those departures from the formula actually resulted in penalizing particular services or whether in the long run they offset each other cannot be determined from the record.

After considering the report of the cost-study committee a majority of the traffic committee was of the opinion that the basis used in the foregoing statement "B" was the proper one. At a subsequent meeting, at which practically all respondents were represented, it was agreed that the figures representing 10 per cent return would be fair. This action was unanimous except that the representatives of the Chicago & Alton, hereinafter called the Alton, were of the opinion that a fair return would be 8 per cent. The Columbia was then informed of the action of the carriers, but declined to accept the rates offered. Negotiations followed, but at the time of the second hearing no general agreement had been reached. After that hearing there were further discussions and negotiations. At a conference held March 9, 1931, executive officials of the respondent carriers appointed Henry Miller, president of the Terminal Railroad Association of St. Louis, as their representative "to handle the drayage matter to a conclusion and with power to act." The evidence indicates that Miller considered certain offers by transfer companies other than the Columbia. One of these made by the Central Transfer Company was received in evidence. It proposed allowances which, in some instances, are less than actual cost as shown by the cost study. This offer was conditioned upon the Central being granted an exclusive contract to run for a period of at least five years, and was not accepted. As a result of Miller's efforts a contract was entered into, dated June 1, 1931, between the Columbia Terminals Company and the Terminal Railroad Association of St. Louis, the latter ostensibly acting for the other respondent carriers who are its proprietary lines, tenants, and licensees. At the third hearing this contract, hereinafter called the new contract, was placed in evidence. At that hearing counsel representing the Alton, The New York, Chicago & St. Louis, and the Litchfield & Madison stated the position of those respondents to be that the new contract was made without their authority and did not represent their views. Except for the three car-
157 riers mentioned, the new contract has been approved by all of the respondents.

The table below compares the rates provided in the new contract with the present rates. It also shows the per cent of the normal annual movement covered by each service:

Service	Per cent of total normal movement	Present rates	Rates under new contract	Reduction from present rates
				Cents
City OB West	21	$2.00	$1.95	5
City OB East	24	2.41	2.04	37
City IB East	13	2.70	2.60	10
East to East	5	1.64	1.52	12
West to West	5	1.71	1.61	10
Trans-Miss.	32	1.92	1.62	30

Based upon 830,514 tons, which they state is the total off-track and interchange service for a normal year, respondents show that the reduced rates provided in the new contract would result in a saving of $181,398.37 annually. They further estimate that the discontinuance of the use of off-track stations by the St. Louis-San Francisco and the Missouri Pacific and the partial discontinuance of the use of such stations by the other west-side lines, as provided in the new contract, would effect an annual saving of $125,000, or a total saving of $306,398.37.

Many of the general provisions of the new contract are similar to those of the contract proposed at the original hearing and reproduced in the appendix in the former report. The following are among the more important differences: The new contract includes two off-track stations in East St. Louis, at 700 Broadway and at the stock yards, which were not mentioned in the former contract, and provides for a service between those off-track stations and the on-track stations in St. Louis. It contains a provision that it shall remain in effect for a period of one year and shall continue thereafter until either party gives six months' notice in writing of a desire for its discontinuance. This provision is substituted for various provisions in the former contract, which was to run for a period of two years and provided for a periodical revision of charges during that time. The new contract also provides that if either party shall fail in its performance the other party shall have the right to cancel the contract upon 60 days' written notice, and that if in the opinion of the railroads the facilities used by the Columbia should at any time prove inadequate, the Columbia will provide such additional facilities

as may, in the opinion of the railroads, be necesssary. It provides that, with respect to traffic moving from off-track stations in St. Louis to on-track stations in St. Louis (OB West), the stations in St. Louis will be divided into two districts, that portion north of Market Street to be known as the North Freight House District, and the portion south of Market Street to be known as the South Freight House District; that the rate provided for this service will apply only to traffic handled from off-track stations in one district to on-track stations in another district, no allowances to be made for handling traffic from off-track stations to on-track stations in the same district.

158 The foregoing discussion concerns primarily off-track station and interchange services. With regard to direct-delivery service, the cost-study data appearing of record are extremely meager. In the former report, at page 159, we said:

The cost of this service (direct delivery) is demonstrable and if the allowance is made to include only cost plus a fair profit there would be no opportunity and no incentive for any shading down of charges to a particular consignee. Then, too, if the allowance is based upon cost of operation plus a fair profit and a similar plan is followed as to the off-track station allowances, the two services would be competitive in reality and not merely in theory or in hope. A figure which will represent cost plus a fair profit may be arrived at by determining the difference between the costs of haulage to and from off-track stations in St. Louis and to and from on-track stations in East St. Louis. Such a figure would also reflect the equalization so earnestly advocated by the west-side lines.

At the second hearing there was introduced in evidence a statement said to embody the results obtained by using the cost-study data in accordance with the method suggested by us. This statement is reproduced below, except that certain of the percentage columns are omitted.

Statement showing actual difference, per 100 pounds, between composite costs of handling less than carload and carload freight between trader's place of business and off-track stations in St. Louis, and trader's place of business in St. Louis and on-track stations in East St. Louis, together with amounts produced by adding thereto a profit based on various rates of return on present-day values (cost of reproduction, less depreciation) of facilities and equipment involved in the handling of freight in direct-delivery service.

Description of Service	Actual difference between composite costs	Rates produced by applying following percentages of profit on present-day values		
		8%	10%	12%
Direct Delivery:	Cents	Cents	Cents	Cents
Less than carload	.0279	.0301	.0306	.0311
Carload	.0161	.0174	.0177	.0180

Respondents having on-track stations in St. Louis, particularly the Wabash and the Chicago and Eastern Illinois, object strenuously to this method. They insist that the east-side carriers may not properly make allowances for this service based upon competition between the on-track stations of the east-side lines in East St. Louis and the off-track stations of the same east-side lines in St. Louis. Considering the matter solely with reference to the question of equalization there is much force in this contention. The direct-delivery service is confined almost exclusively to inbound traffic. The west-side lines in delivering less-than-carload freight to consignees in St. Louis do not use the off-track stations, but em-
ploy their own on-track stations. It appears, there-
159 fore, that the real competition to be equalized is that between the east-side lines making deliveries through their east-side on-track stations and the west-side lines making deliveries through their west-side on-track stations. This being true, a more satisfactory measure of the allowance necessary to effect this equalization by means of the direct-delivery service would be the difference between the cost of haulage from the on-track stations in East St. Louis to trader's place of business in St. Louis, on the one hand, and from the on-track stations in St. Louis to the trader's place of business, on the other. No complete statement of this difference which may be compared with the statement reproduced above can be made from the record. For reasons previously indicated, none of the basic figures from which the results were obtained was put in evidence. However, some interesting facts were developed upon cross-examination. The cost study shows that of the six transfer companies whose operations were studied, the costs of three of the more important are higher for hauling between on-track stations in St. Louis and the trader's place of business in St. Louis than between on-track stations in East St. Louis and the trader's place of business in St. Louis. The average cost of the six transfer companies studied of performing the direct-delivery service was shown to be one-tenth of one mill less than the average cost of the same companies for hauling between the

trader's place of business and the on-track stations in St. Louis. These figures, drawn from the cost study, seem to indicate that the direct-delivery allowances proposed by respondents other than the Alton are sufficient to place the east-side lines in at least as favorable a position as the west-side lines in respect of the receiver of freight in St. Louis.

Considered from the standpoint of the east-side lines, apart from their competitive relation to the west-side lines, the problem would seem to be that of determining the most economical means of fulfilling their tariff obligation to transport freight to St. Louis. The highest direct-delivery allowance suggested by any respondent is the less-than-carload allowance of 5 cents per 100 pounds, or $1 per ton, proposed by the Alton. The allowance paid by the east-side lines for inbound off-track service in St. Louis is $2.70 and the allowance for this service provided in the new contract is $2.60. Obviously, considering this phase of the problem by itself, the east-side lines would be justified in paying a direct-delivery allowance sufficiently large to increase the use of this more economical service, provided it were not so high as to afford an opportunity for the transfer companies to shade their charges to the consignee. In fixing upon an amount which might be expected to encourage the use of the direct-delivery service and, at the same time, would not exceed the maximum amount above which unlawful concessions to shippers would be possible, the best guide offered by the record is the statement of differences in costs reproduced above. This statement indicates that allowances of approximately 3 cents for less than carloads and 2 cents for carloads would be necessary to equalize the cost to the consignee of having his freight delivered from the on-track stations in East St. Louis with the cost of having it delivered from the off-track stations in St. Louis.

On brief, counsel for St. Louis shipping interests and several transfer companies contend that the record on further hearing, by reason of the failure to submit the basic figures of the cost study, does not properly reflect the direct-delivery costs. They ask that we require respondents to establish allowances for direct-delivery service satisfactory
160 to the transfer companies who are able and willing to engage in that service, such allowances not to exceed 5 cents and 3 cents on less-than-carload and carload freight, respectively.

Conclusions

As indicated in the prior report, our powers with respect to the off-track and interchange services are extremely limited. In that report we found that the employment of a single transfer company to perform these services and the proposed reduction in the number of off-track stations were not in violation of the interstate commerce act. These proposals are covered by the new contract. We declined to approve the allowances because they were not based on a cost study. Such a cost study has now been made and its results were available when the new contract was negotiated. This contract apparently is concurred in by all of the respondent carriers, except the Alton, the New York, Chicago & St. Louis, and the Litchfield & Madison. It provides allowances for the off-track and interchange services which are considerably less than the present allowances, will effect material savings to respondents, and, taken as a whole, do not appear to us to be greater than are reasonable for the services performed. Accordingly, the allowances to be made for such services have our approval.

The allowances proposed for the direct-delivery service in the suspended schedules are: 5 cents for less-than-carloads and 3 cents for carloads by the Alton, and 2 cents for less-than-carloads and 1 cent for carloads by the other respondents. The cost study before us does not purport to show the cost of that part of the direct-delivery service theoretically covered by the allowance; that is, the service between the on-track stations in East St. Louis and the constructive station in St. Louis. As previously shown, however, it does indicate that the smaller proposed allowances would be sufficient to bring about the equalization between the east-side carriers having no on-track stations in St. Louis, on the one hand, and the east-side and west-side carriers having such stations in St. Louis, one the other, which is, of course, the principal consideration of the carriers advocating these allowances. It indicates, further, that the smaller proposed allowances would not be greater than are reasonable for the services performed, and that the allowances proposed by the Alton are greater than would appear to be warranted by such common-carrier services.

We find that the suspended schedules, other than those filed by the Alton, have been justified. We further find that the suspended schedules filed by the Alton have not been justified. Orders will be entered requiring the cancellation of the latter schedules, and discontinuing these proceedings.

161 Eastman, Commissioner, dissenting:

The carriers perform a very important part of their freight service in St. Louis and East St. Louis through the agency of trucking companies. Some time ago they decided that this service could best be performed through a single agency. Having arrived at this conclusion, two courses of action were open, either of which could be defended. The best course would have been to use for this purpose an agency under carrier ownership or control. It has never been shown that such a plan is impracticable. The Railway Express Agency was such an instrument ready at hand which might easily have been adapted to this use. Or the Terminal Railroad Association, which is the common terminal agent of the carriers in the St. Louis district and which they own and control, could have been so utilized. However, assuming that for some undisclosed reason it was necessary to resort to an independent, non-carrier agency, the next best course would have been to select such an agency through open, competitive bidding by financially responsible concerns competent to do the work.

Neither one of these defensible courses was followed. Instead, the carriers undertook to confer the monopoly without contest upon the Columbia Terminals Company. A proposed contract was negotiated under the auspices, in part, of carrier officers who had a direct financial interest in the Columbia or an affiliated company. This contract was considered in our prior report in this proceeding, and not a single commissioner was willing to approve the allowances which it proposed to make to the trucking company. The majority found that they represented "nothing more than a vague sort of a compromise," and that a cost study was requisite. In a separate opinion I pointed out other patent defects in the contract.

The proceedings were held open so that a cost study might be made. The report by the majority of the commission stated that the "Columbia is handling more than 90 per cent of the business, and its costs should certainly be fairly representative." It was further stated that when the costs were determined, the proceeding would be "set down for further hearing for the purpose of introducing them in evidence along with supporting data and testimony, subject to cross-examination by interested parties."

At the second hearing the results of this cost study were presented of record. Except for the direct-delivery service, it was confined to the operations of the Columbia and its

East St. Louis subsidiary. It was made by a committee representing the carriers working in conjunction with the Columbia, the trucking company upon which the carriers had already decided to confer the monopoly. Under the circumstances the Central Transfer Company refused to permit its books and records to be examined. A witness for that company, however, testified that it stands ready to permit such an examination any time that the carriers open up the service to competitive bidding.

The bare results of the cost study were submitted without supporting details by a witness who had had general direction of the study but was without personal knowledge of the underlying data. Although the majority of the commission had stated, in the prior report, that the costs were to be introduced "in evidence along with supporting data and testimony, subject to cross-examination by interested parties", a request that the supporting data be presented of record was denied by the presiding examiner on the ground
162 that it would divulge business secrets. The costs estimated included a return upon the fair value of the Columbia's property. This value was determined by an appraisal company employed and paid by the Columbia, and the valuation was not introduced of record. Obviously it was important to know the basis upon which it was made, and whether or not it was properly confined and apportioned to the property of the Columbia used in the service in question. But it is impossible to determine these facts upon the record as made.

A representative of the commission agreed to a formula which was followed in the cost study, but he took no further part in it. The supporting data relating to operating costs and valuation were not examined by him or any other representative of the commission. Our Bureau of Valuation was not consulted, notwithstanding the obvious embarrassment which the carriers would suffer in resisting a high valuation of the Columbia's property, in view of their contentions in valuation proceedings before the commission affecting their own properties.

After the original cost study was completed, the Columbia claimed that the depreciation rates used in determining its operating costs were too low. They were the depreciation rates which the appraisal company had used in estimating property value. Thereafter a new study was made which increased operating costs to allow for these claimed higher depreciation rates. The results submitted of record,

however, show on their face that no corresponding change downward was made in the value figure. As indicated in the majority report herein, three columns of proposed allowances were shown, based respectively on an 8, a 10, and a 12 per cent return on the alleged fair value. After deliberation, a majority of the carriers' cost committee decided to accept the figures based, in the case of operating costs but not valuation, on the Columbia's claimed higher depreciation rates and a 10 per cent return. There was only one dissenter, who ventured to suggest that an 8 per cent return might perhaps be fair.

The Chicago & Eastern Illinois was not represented on the cost committee. In a brief filed after the presentation of the cost study, that carrier characterized it as "worthless because unsupported by competent evidence". The characterization is not too harsh. There is no evidence of record which would justify a conclusion as to whether the costs developed were right or wrong. We can take it on faith, if we wish to do so, but certainly not on proof.

After the alleged cost study was presented of record, there were further negotiations and it is said that the carriers finally appointed Henry Miller, president of the Terminal Railroad Association of St. Louis, as their representative "to handle the drayage matter to a conclusion and with power to act". There is no competent evidence on this point, except a denial by the receiver of the Chicago & Alton that there was any valid delegation of such authority. However that may be, Miller did negotiate a contract with the Columbia Terminals Company which is signed by him as president of the Terminal Railroad Association and purports to be made, on his part, on behalf of the "Association, its proprietary lines, tenants, and licensees". There is no evidence that the Association, which has no direct interest in the matter, ever authorized such a contract. The record does contain a "Memorandum of Conference", submitted by
163 counsel without supporting testimony, which contains a resolution purporting to authorize Miller to act, but this was a conference of "executive officials of St. Louis lines", not a meeting of the directors of the Association, and one of the executives whose name appears on the document took the stand and denied its authenticity. Moreover, the Alton, the Nickel Plate, and the Litchfield & Madison all deny that the contract was made with their authority. The contract provides for certain allowances to be paid to the Columbia for off-track station and interchange services, and it is approved by the majority report herein, in respect "of allowances to be made for such services."

The following table compares the allowances specified by this contract with those which were computed under the cost study to cover, respectively, an 8 and a 10 per cent return, using operating costs enhanced by the higher depreciation rates claimed by the Columbia:

Service	Contract Allowance	Cost-Study Allowances 8%	10%
City OB West	$1.95	$1.95	$2.02
City OB East	2.04	2.00	2.08
City IB East	2.60	2.69	2.79
East to East	1.52	1.42	1.44
West to West	1.61	1.52	1.55
Trans-Mississippi	1.62	1.53	1.56

It will be noted that three of the contract allowances exceed the 10 per cent basis, 4 exceed the 8 per cent basis, one is on that basis, and out of the 6 only one is on a slightly lower basis. Compared with the allowances now paid to the Columbia, these new contract rates would effect a saving of $181,398 per year on the basis of 1929 traffic, and of $145,270 per year on the basis of estimated 1930 traffic. However, the present charges of the Central Transfer Company, which is now handling a substantial portion of the business, are less than those of the Columbia. A further annual saving of $125,000, on the basis of 1929 traffic, is estimated from the discontinuance of the use of certain off-track stations by the Missouri Pacific and the Frisco. But this discontinuance was permitted by our prior report, and could have been made without awaiting the results of the cost study.

The majority report herein contains the following statement:

The evidence indicates that Miller considered offers by transfer companies other than the Columbia. One of these made by the Central Transfer Company was received in evidence. It proposed allowances which, in some instances, are less than actual cost as shown by the cost study. This offer was conditioned upon the Central being granted an exclusive contract to run for a period of at least five years, and was not accepted.

The fact is that neither Miller nor anybody else in authority took the stand to explain the contract which he negotiated, or any of the circumstances leading up to it. As stated above, this contract was placed in the record by counsel without supporting testimony. The only information as to other
164 offers was elicited in the testimony of the receiver of the Alton, of his assistant, and of the general manager

of the Central Transfer Company. It is clear that bids were not publicly invited. The receiver of the Alton suggested that bids be obtained from two large trucking companies in Chicago. Apparently representatives of those companies did see Miller, but there is no competent evidence that they submitted actual bids. On the contrary, the testimony, which is all hearsay on this point, is that they submitted none, feeling that to do so would be useless because the carriers were too strongly committed to the Columbia.

The general manager of the Central testified that his company was not asked to bid. It learned indirectly that Miller had the matter in charge and finally obtained an audience with him. He had no set of specifications as a basis for a bid, but finally gave the representative of the Central certain incomplete and vague data in lieu of specifications and agreed to receive a bid from that company. A proposal was submitted, involving an annual saving of more than $500,000 over present allowances, in comparison with the saving of about $180,000 effected by the contract which Miller negotiated with the Columbia. In the proposal, various deficiencies in the specifications were noted, among others the fact that the length of the contract had not been stipulated. It was, therefore, assumed that the period was to be at least 5 years. The general manager of the Central testified, however, that the proposal was not contingent upon any length of time, and that his company would be willing to take the contract for one year. He also testified that it would furnish a suitable bond to insure performance and, if the contract is opened to fair, competitive bidding, submit its books and records for the inspection of the carriers. Incidentally, the Miller contract with the Columbia does not require a bond to be furnished.

In my separate statement at the time of the prior report, I expressed the view that the suspended tariff provisions "constitute a sufficient threat to the proper performance of respondents' lawful duties under section 1 so that we would be warranted in requiring their cancellation", giving quite fully the reasons for that view. I am still of that opinion. I also expressed the view that we are without power to control the amounts which the carriers see fit to pay for such services as those here involved, "so long as such allowances are not used as an indirect means of granting preferences to shippers or do not interfere with the proper performance of transportation duties." Because the trucking company which is here to be employed as a carrier agent performs service, also, directly for shippers, counsel for the Alton argues that

it is necessary for us to exercise control over these allowances in order to avoid indirect preferences of shippers. There may be substance in that argument. But however that may be, the majority report herein does, in effect, assert jurisdiction to pass upon the amounts of the allowances.

Assuming that we have such jurisdiction, therefore, have the allowances been justified? The alleged cost study is a mere statement of unsupported conclusions, and is wholly inconclusive. The case for the Miller contract, so-called, is even weaker. In fact no attempt was made to make out a case. It follows that the evidence of record is worthless as a justification for the proposed allowances. Under the circumstances, if we are to approve the allowances which the carriers are to pay for these trucking services, and if
165 they are to confer a monopoly upon a single, independent agency, I believe that we should inform the carriers that to justify any such allowances it will be necessary for them to show, by the results of open, competitive bidding under conditions prescribed by us, that they are the most favorable allowances which can be obtained.

It remains to discuss the so-called direct-delivery service. It was shown in the prior report that this service had fallen off very greatly in volume. It was stated that "no outbound and only 3 per cent of the inbound business is moving in direct-delivery service," and that a "complete lack of balance" existed between the allowances proposed for the off-track station service and those proposed for the direct-delivery service. How a proper balance should be established was clearly indicated. Under the direct-delivery service, which is furnished between on-track stations in East St. Louis and shippers' places of business in St. Louis, a constructive station at the west end of the Eads Bridge takes the place of an off-track station in St. Louis. The service performed by the trucking company between this constructive station and the on-track station in East St. Louis is regarded as carrier service performed as agent for the east-side railroad. The remainder of the service performed between the constructive station and the shipper's place of business is non-carrier service performed for the shipper. This division of service is precisely the same as in the case of the off-track stations, except that there is no actual delivery at the constructive station, so that the unloading and reloading of trucks is unnecessary.

As I read the prior report, it was there made clear that the proper method of equalizing the direct-delivery service with

the off-track station service would be to restrict the allowance by the carrier to the trucking company in each instance to the cost of the service performed for the carrier plus a fair profit. In the one case, this was the service performed between the on-track station in East St. Louis and the constructive station at the west end of the Eads Bridge. In the other, it was the service performed between the on-track station in St. Louis and the off-track station. It was pointed out that the constructive station is "located at the first and natural point of contact with the St. Louis side of the river", and at page 155 it was said:

If the constructive station is not unlawful or improper, and if the allowances paid for the movement between it and the railroad stations on the east side are based on cost of service plus a fair profit, contiguity to such a station is a natural advantage which may lawfully redound to the benefit of a consignee or shipper to the same extent as contiguity to an on-track or off-track station.

And at page 159 it was further stated:

The service between the on-line stations in East St. Louis and the constructive station is a service performed for and on behalf of the carrier. If it is performed by an independent agent that agent is entitled to a reasonable compensation which would cover the cost of operation plus a fair profit. At that figure the service would be attractive. Below it, it would be shunned by everyone in position to take it or leave it. The cost of this service is demonstrable and if the allowance is made to include only cost plus a fair profit there would be no opportunity and no incentive for any shading down of
166 charges to a particular consignee. Then, too, if the allowance is based upon cost of operation plus a fair profit and a similar plan is followed as to the off-track station allowances the two services would be competitive in reality and not merely in theory or in hope.

This impresses me as sound reasoning, but my understanding is that it has been wholly abandoned in the present majority report. The allowances to trucking companies for direct-delivery service of 2 cents for less-than-carload traffic and on fruits and vegetables, in carloads, and 1 cent for other carload traffic, proposed by the carriers other than the Alton, are approved, although they are the same allowances which were found in the prior report to be completely out of balance with the off-track station allowances. My under-

standing is that these direct-delivery allowances are not based in any way on the cost of service plus a fair profit between the constructive station and the on-track stations in East St. Louis; that the cost study is deficient in indicating what the cost of this service plus a fair profit may be; but that such evidence as is available points to a conclusion that these allowances fall considerably short of such an amount. These allowances for direct-delivery service are, therefore, quite different from those approved in the case of the off-track station service, for the latter cover fully the cost as developed by the alleged cost study plus a profit which is probably much more than fair. I know of no sound reason for this difference of treatment, which is opposed to the whole constructive-station theory and is equivalent to transferring that station from where it is now supposed to be located to some unknown point east thereof on the bridge or even on the East St. Louis side. The development of the direct-delivery service, which was deemed desirable in the prior report, seems very unlikely to occur under this mode of treatment.

McManamy, Commissioner, dissenting:

For reasons stated in my dissenting expression in the former report, 155 I. C. C. 129, I disagree with the conclusions here reached.

Commissioner Mahaffie dissents.

Commissioners Aitchison and Tate did not participate in the disposition of these cases.

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167 Order.

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 27th day of July, A. D., 1931.

No. 19594.

Transfer of Freight Within St. Louis and East St. Louis by Dray and Truck for and on Behalf of Railroads.

It appearing, That by order dated May 2, 1927, the commission entered upon an investigation in respect of the receipt, delivery, transfer, or other handling of freight in, within, and between the switching districts of East St. Louis, Ill., and St. Louis, Mo., by means of motor trucks, drays, or other vehicles operated on and over the public highways;

It further appearing, That such investigation has been had, and that the commission, on May 13, 1929, made and

filed a report, 155 I. C. C. 129, and on the date hereof, has made and filed a report on further hearing, both reports containing the results of said investigation:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the commission.

(Seal) GEORGE B. McGINTY,
Secretary.

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168 At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 27th day of July, A. D., 1931.

Investigation and Suspension Docket No. 2934.

Off-track Station and Constructive Receipt and Delivery of Freight at St. Louis, Mo., and East St. Louis, Ill.

It appearing, That by order dated June 20, 1927, the commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said order, and suspended the operation of the said schedules until February 1, 1928, and later dates, and that the operation of said schedules has been voluntarily postponed until November 1, 1931.

It further apearing, That a full investigation of the matters and things involved has been had, and that the commission, on May 13, 1929, made and filed a report, 155 I. C. C. 129, and on the date hereof has made and filed a report on further hearing, both reports containing its findings of fact and conclusions thereon, which said reports are hereby referred to and made a part hereof:

It is ordered, That respondent Chicago and Alton Railroad Company be, and it is hereby, notified and required to cancel said schedules as filed by it on or before September 24, 1931, upon notice to this commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act, and that this proceeding be discontinued.

By the commission.

(Seal) GEORGE B. McGINTY,
Secretary.

A True Copy, George B. McGinty, Secretary.

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169 (Clerk's Certificate.)

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

I, Jas. J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri Do Hereby Certify the above and foregoing to be a full, true and complete transcript (except insofar as the same is restricted by the praecipe for transcript heretofore set out) of the record and proceedings in cause No. 9582, In Equity, wherein Central Transfer Company, a corporation, is plaintiff and Terminal Railroad Association of St. Louis, et al., are defendants, as fully as the same remains on file and of record in my office and that the original citation is attached hereto and returned herewith.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said Court at office in the City of St. Louis, in said Division of said District, this 8th day of December, in the year of our Lord, Nineteen Hundred and Thirty-one.

Seal
U. S. Dist. Court
Eastern Div. of the
Eastern Jud. Dist. of
Missouri.

JAS J. O'CONNOR,
Clerk of said Court.
By J. R. O'Connor,
Deputy.

Filed Dec. 9, 1931, E. E. Koch, Clerk.

165 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Mr. Glendy B. Arnold as Counsel for Appellant.)

United States Circuit Court of Appeals, Eighth Circuit.

Central Transfer Company, Appellant,
No. 9366 vs.
Terminal Railroad Association of St. Louis, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

GLENDY B. ARNOLD,
418 Olive St., St. Louis.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 9, 1931.

(Appearance of Mr. Roy M. Eilers as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

ROY M. EILERS,
705 Olive St., St. Louis.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 26, 1931.

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166 (Appearance of Mr. Charles S. Burg as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

CHARLES S. BURG.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 22, 1931.

(Appearance of Mr. Harold R. Small as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees, Louisville & Nashville Rd. Co. and St. Louis Southwestern R. Co.

HAROLD R. SMALL.

The firm of which I am a member representing the latter —firm being Carter, Jones & Turney.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 22, 1931.

(Appearance of Mr. H. H. Larimore as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

H. H. LARIMORE,
Mo. Pac. Bldg., St. Louis, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 23, 1931.

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167 (Appearance of Mr. Guy A. Thompson and Mr. Joseph R. Long, Jr., as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

GUY A. THOMPSON,

JOSEPH R. LONG, JR.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 23, 1931.

(Appearance of Mr. Thomas W. White as Counsel for the Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

THOMAS W. WHITE.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 24, 1931.

(Appearance of Mr. Walter N. Davis as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

WALTER N. DAVIS,
c/o Terminal R. R. Ass'n. of St. Louis, Union Station, St. Louis, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 30, 1931.

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168 (Appearance of Mr. L. H. Strasser as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

L. H. STRASSER,
1667 Railway Exchange Bldg.,
St. Louis, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 31, 1931.

(Order of Submission.)

May Term, 1932.

Monday, May 9, 1932.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Glendy B. Arnold for appellant, continued by Mr. C. S. Burg and Mr. H. H. Larimore for appellees and concluded by Mr. Glendy B. Arnold for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

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169 (Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 9366.—October Term, A. D. 1932.

Central Transfer Company, Appellant, vs. Terminal Railroad Association of St. Louis, et al., Appellees.	Appeal from the District Court of the United States for the Eastern District of Missouri.

Mr. Glendy B. Arnold (Mr. Roy M. Eilers was with him on the brief), for appellant.

Mr. C. S. Burg and Mr. H. H. Larimore (Mr. D. P. Connell, Mr. W. N. Davis, Mr. A. H. Kiskaddon, Mr. M. G. Roberts, Mr. Harold R. Small, Mr. L. H. Strasser, Mr. Guy A. Thompson, Mr. Thomas W. White, Mr. Edward J. White, Mr. J. M. Bryson, Mr. E. T. Miller, Mr. N. S. Brown and Mr. T. M. Pierce were with them on the brief), for appellees.

Before GARDNER, SANBORN and BOOTH, Circuit Judges.

SANBORN, Circuit Judge, delivered the opinion of the court.

The appellant (plaintiff in the court below) filed its complaint on August 24, 1931, against the appellees (defendants) in the United States District Court for the Eastern District of Missouri, praying for injunctive relief under Section 26, Title 15, U. S. C. The cause of action stated in the complaint was that the defendants had entered into and were about to carry out an unlawful agreement, the effect of which would be to destroy the interstate transfer business of the plaintiff within the St. Louis and East St. Louis switching district and to restrain unduly interstate transportation of freight in less-than-carload lots by motor trucks within and between these cities, and to create an illegal monopoly of such business, in violation of Sections 1 and 2, Title 15, U. S. C. The defendants in their answer asserted that the plaintiff was without legal capacity to sue and that the agreement complained of was not unlawful. The case was tried, and the court made findings of fact and declarations of law, determining both issues in the defendants' favor. A decree of dismissal was entered, from which this appeal was taken.

The only dispute so far as the facts are concerned seems to be with respect to the purity or impurity of the motives of the carrier defendants in contracting with the defendant Columbia Terminals Company (hereinafter called the Columbia) to act as their sole agent in the transfer of less-than-carload freight between their off-track and on-track stations, and between their respective on-track stations, and in the maintenance of their off-track stations in the cities of St. Louis and East St. Louis.

The essential facts are not in dispute, and the first question for determination is whether the facts justify the court's conclusion that the plaintiff was without right to sue.

The plaintiff is a transfer or trucking company hauling freight, for hire, by motor truck within the St. Louis, Missouri, and East St. Louis, Illinois, district. With the exception of the Columbia, the defendants are common carriers by railroad of freight and passengers, and are subject to the Interstate Commerce Act. They constitute virtually all of the steam railroad lines having terminals in St. Louis or East St. Louis. The Columbia is, like the plaintiff, a transfer and trucking company engaged in the business of hauling freight between the off-track and on-track stations of the carriers and in interchange between their on-track stations in this same district. For many years before the complaint was filed, the carriers had designated off-track stations in St. Louis and East St. Louis where less-than-carload freight could be received and delivered. The rails of the carriers operating east of the Mississippi ended in East St. Louis, but their tariffs provided rates to and from St. Louis, and the service of the transporting less-than-carload freight from the ends of their rails in East St. Louis to their off-track stations in St. Louis was performed by transfer companies severally employed by them. The carriers operating west of the Mississippi, whose terminals were in St. Louis, maintained off-track stations in certain sections of that City and also employed transfer companies to transport less-than-carload freight between their off-track and on-track stations. The interchange of less-than-carload freight between the on-track station of one carrier and the on-track station of another carrier was also provided by transfer companies employed by the several carriers. The off-track stations were the places of business of the transfer companies, and were designated and named in tariffs on file with the Interstate Commerce Commission as points at which the carriers would receive and deliver less-than-carload freight. In 1918 there were four transfer companies performing services for the various carriers in the handling of less-than-carload freight billed to and from off-track stations and also in handling the interchange of such freight between on-track stations. By the time this complaint was filed, there were left only the plaintiff and the Columbia, the latter having acquired either the ownership or control of the other competitors at a time (1926) when the carrier defendants were contemplating entering into a joint arrangement with it for the purpose of having it act as their sole agent for the handling of their less-than-carload freight to and from off-track stations and for their interchange business in the St. Louis-East St. Louis district.

Carload freight moving between East St. Louis and St. Louis was handled by the Terminal Railroad Association of St. Louis, over its

bridges and other terminal facilities, as the agent for all of the carriers.

In furtherance of the purpose formed during the year 1926 to limit the handling of their less-than-carload freight between their on-track and off-track stations, and in interchange, to one transfer company and to reduce the number of their off-track stations, the carriers filed on May 21, 1927, through their joint publishing agent, their tariff I. C. C. No. 1950, effective July 1, 1927, wherein they proposed to reduce the number of off-track stations in St. Louis from twelve to seven, and to reduce those at East St. Louis from two to one. The tariff provided for the application of rates to such off-track stations. Of the five off-track stations to be eliminated at St. Louis, two were operated by the Columbia and three by the plaintiff. At East St. Louis, the off-track station eliminated was operated by a transfer company controlled by the Columbia. Protests having been filed against the tariff, the Commission suspended the schedules and entered upon an investigation as to their lawfulness. Because of the investigation, the effective date of the tariff was postponed until November 1, 1931.

The Interstate Commerce Commission on November 1, 1927, began its hearing to determine the lawfulness of the methods proposed by the carriers for reducing the number of off-track stations. On May 13, 1929, its report was filed, 155 I. C. C. 129. The Commission reached the conclusion that the proposal of the carriers to employ a single transfer company for the operation of off-track stations and the haulage between such stations and the on-track stations of the railroads and in the interchange of freight between the carriers, was not violative of any provision of the Interstate Commerce Act, and that the proposals to reduce the number of off-track stations in St. Louis and East St. Louis would not be harmful to the public interest.

The Commission, in the absence of a cost study, declined to approve the allowances which the carriers proposed to pay for the services of their sole agent, and directed that a cost study be made by the carriers. A further hearing as to the reasonableness of the proposed allowances was held by the Commission, and it filed its report on July 27, 1931, approving such allowances. 177 I. C. C. 316.

The off-track stations provided for in the tariff approved by the Commission, to become effective on November 1, 1931, were located only at the places of business of the Columbia. The schedules

eliminated as off-track stations the places of business of the plaintiff and provided for the application of rates to only the off-track stations named in the tariff.

The plaintiff offered to become the sole agent of the carriers, but by contract dated June 1, 1931, the Columbia was employed to perform the services. The effect of this contract, so far as the plaintiff is concerned, will be to deprive it of the business of maintaining the off-track stations which it previously maintained for the carriers, and to take away from it the business of acting as the agent of any of the defendant carriers in the transfer of less-than-carload freight between off-track and on-track stations, and between on-track stations, and virtually to destroy its business, which consisted almost entirely of the performance of these services for the carriers.

For the purpose of determining whether the plaintiff may maintain this suit, it is not necessary to set forth in detail the provisions of the contract in question. It constitutes the Columbia the sole agent of the carriers for the maintenance of the off-track stations designated in the tariff, and for the transfer of less-than-carload freight. We shall assume, for the purpose of the argument, that the agreement is what the plaintiff asserts it to be, that it was entered into by the carriers for the purpose of destroying the business of the plaintiff, and that it will constitute an undue restraint upon interstate commerce, will create a monopoly, and will cause the plaintiff irreparable loss and damage.

Section 26, Title 15, U. S. C. (Sec. 16 of the Clayton Act) authorizes a corporation to sue for and have injunctive relief against threatened loss or damage by a violation of the anti-trust laws, "provided, that nothing herein contained shall be construed to entitle any * * * corporation [etc.] * * * except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapter 1 of Title 49, Transportation, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

The plaintiff asks no relief against the Columbia, which is not a carrier subject to the Interstate Commerce Act. Concededly, all the other defendants are carriers subject to that act. The only question, then, is whether the suit by the plaintiff is "in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

The plaintiff concedes that the services performed by the carriers in furnishing off-track stations and in transferring less-than-carload

freight from on-track to off-track stations are matters over which the Interstate Commerce Commission has jurisdiction. Quoting from the plaintiff's reply brief:

"We have always conceded that the Interstate Commerce Commission has jurisdiction of the services performed by these transfer companies, and that the Commission may investigate the service to determine whether the carrier appellees have violated any of the provisions of the Interstate Commerce Act. There is no doubt about this jurisdiction of the Commission, but, as the Commission has correctly held, it has no jurisdiction to control the carriers' discretion in selecting their agents who perform the service."

It is the plaintiff's theory that, while the services to be performed under the contract, the cost of which is necessarily reflected in the rates contained in the tariffs filed with the Commission, are matters subject to the jurisdiction of the Commission, the agreement itself providing for such services and fixing compensation therefor is not such a matter, and therefore that a suit brought for injunctive relief against the performance of the agreement is not in respect to any matter within the jurisdiction of the Commission. It is asserted that the court may prevent the carrying out of the contract without affecting the services to be performed or the rates to be charged for such services. To separate the matter of the services required to be performed for the carriers by the Columbia from the agreement by which the railroads have contracted for their performance, and to enjoin the carrying out of the contract without affecting the services or the rates, would seem to require one of those delicate major operations which, while successful from a surgical standpoint, necessarily kills the patient. Under the plaintiff's theory, the court can enjoin the carriers from establishing off-track stations at the places of business of the Columbia as provided by the contract, but leave the tariffs designating such stations undisturbed; it may enjoin the carriers from employing the Columbia as their sole transfer agent, and yet leave undisturbed the services which the Columbia is to perform for the carriers at a stipulated cost, as well as the tariff rates which reflect the cost of such services. The suggestion seems to be that with the performance of the contract enjoined, the carriers, without combining, can contract elsewhere for the services with the plaintiff or anyone else; but how the stations designated in the tariff and belonging to the Columbia could be used with the carriers enjoined from performing their contract, or how other transfer companies not having a monopoly of the carriers' business could be compelled or

even induced to perform the service of handling the less-than-carload freight between on-track and off-track stations so as to require no changes in the tariff, remains in obscurity.

Unquestionably, as the plaintiff concedes, the Interstate Commerce Commission had jurisdiction to investigate, as it did, the reasonableness and lawfulness of what the carriers proposed to do, namely, to reduce the number of off-track stations and to employ a single transfer company to maintain for them such stations and to receive and deliver less-than-carload freight from and to their off-track stations. In *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33, 42, the Supreme Court said:

"The Interstate Commerce Act confers upon the Commission powers of investigation in very broad language and this court has refused by construction to limit it so far as the business of the carriers is concerned and their relation to the public. And it would seem to be a necessary deduction from the cases that the investigating and supervising powers of the Commission extend to all of the activities of carriers and to all sums expended by them which could affect in any way their benefit or burden as agents of the public. If it be grasped thoroughly and kept in attention that they are public agents, we have at least the principle which should determine judgment in particular instances of regulation or investigation; and it is not far from true—it may be it is entirely true, as said by the Commission—that 'there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce.' "

The charge for the terminal services to be performed by the Columbia with respect to less-than-carload freight was included in the carrier's rate for the line haul; and the service was one in the performance and cost of which the shippers were vitally interested. The services could have been performed by each carrier for itself or by all the carriers jointly, by each carrier employing an agent or agents to perform it, or by all the carriers together employing an agent or several agents. Had the carriers, with the approval of the Interstate Commerce Commission, combined and maintained their own off-track stations, purchased their own trucks and hauled for themselves their own less-than-carload freight, the arrangement pursuant to which that was done would, on the plaintiff's theory, be subject to the same attack which it makes upon this agreement. But could it logically be held that the plaintiff might enjoin the carriers from maintaining such stations and performing such services with-

out asking injunctive relief in respect of a matter within the jurisdiction of the Interstate Commerce Commission? The fact that the Interstate Commerce Commission has no jurisdiction to name for the railroads the particular agency which shall perform the service of maintaining off-track stations and of transferring freight, its jurisdiction being regulatory and administrative and not managerial, is of no consequence. It is not the agency selected by the carriers that is the real matter in controversy, but rather the adoption by the carriers jointly of a method or practice of handling less-than-carload freight between off-track and on-track stations which eliminates the plaintiff as a competitor of the agency selected. Since the subject-matter of the agreement in so far as it affects these services and establishes a method and practice for handling less-than-carload freight moving in interstate commerce to off-track stations designated in filed tariffs at rates specified in those tariffs, is under the supervisory jurisdiction of the Commission, the plaintiff may not sue to enjoin performance of either the services or the contract through which they are provided, even though the Commission may not control the carriers' selection of an agency.

In *Wheeling & Lake Erie Ry. Co.* v. *Pittsburgh & West Virginia Ry. Co.*, 33 Fed. (2d) 390 (C. C. A. 6th), a stockholder sought to enjoin a carrier from abandoning a certain passenger station in Cleveland or from entering into any contract with the Cleveland Union Terminals Company, a corporation organized to build a union station at the Public Square in Cleveland, whereby the Terminals Company would have a right to enter upon the site of that station to make excavations, until a certificate of public convenience and necessity had been obtained from the Interstate Commerce Commission. Other details clouded the case, but it was assumed that the plaintiff sought injunctive relief only with respect to this proposed agreement, which had not been approved by the Interstate Commerce Commission. The District Court had granted an injunction. The Court of Appeals vacated the order, and certiorari was later denied by the United States Supreme Court, 280 U. S. 593. That the Court of Appeals regarded even the contract as a matter subject to the jurisdiction of the Interstate Commerce Commission is apparent. We quote the following language (page 393):

"Nor is there any basis for the injunction in the Clayton Act. All the matters complained of under that act are subject to the regulation and supervision of the Interstate Commerce Commission, and by the express terms of the act no one, except the United States, is

authorized to bring a suit in equity thereunder for injunctive relief, in respect of any matter subject to the regulation and supervision of the Commission. * * * * If the Commission should not give its approval to the contract of December, 1928, the property of the Wheeling Company will be restored to the condition that it was in when the work was begun. In the meantime that company is receiving more than $5,000 a month rent while the work is in progress. This, in view of other provisions of the contract, seems to be an entirely adequate rental. *If the contract should be approved by the Commission, there will be an administrative determination by an expert body, entitled to the greatest weight, that the arrangement is just and reasonable.* If it should not be approved as drawn, the Commission has the power either to reject it entirely or to approve it upon terms that the Commission deems fair to all parties interested, including the stockholders. The plaintiff has the right to present its views of these matters to the Commission, and, if it is dissatisfied with the decision of that tribunal, it may go further and present them to the courts."

The purpose of the proviso in Section 26, Title 15, U. S. C., clearly is to prevent private interference by way of injunction with the business of interstate carriers in which the rights of the shippers and the public generally are necessarily superior to those of any individual, and to leave suits for injunctive relief against interstate carriers, based upon a violation of the anti-trust laws, with respect to all matters under the jurisdiction of the Interstate Commerce Commission, to be initiated by the United States as the representative of the public.

If the method which the carriers have adopted to solve the problem of maintaining off-track stations and of handling less-than-carload freight in the St. Louis-East St. Louis district is a violation of the anti-trust laws, the United States can bring suit to enjoin, but the plaintiff cannot. Apparently, however, all that the carriers have done is to arrange jointly for the performance of a terminal service for less-than-carload freight not differing substantially from the service performed by the Terminal Association with respect to carload freight. See *United States* v. *Terminal R. R. Association of St. Louis*, 224 U. S. 383; *Terminal R. R. Association of St. Louis* v. *United States*, 266 U. S. 17.

We do not find any case which involves the precise question here presented. Perhaps the nearest approach to it was *Keogh* v. *Chicago & Northwestern Ry. Co.*, 260 U. S. 156, which was an action

to recover damages for alleged violation of the anti-trust laws. The plaintiff, who was a manufacturer, charged that certain carriers, through an unlawful combination, had increased the rates on commodities of which he was a shipper, and sought damages to the extent of the difference between what he had paid under the higher rates contained in the tariffs filed with the Commission and what he would have paid under the lower rates which had previously prevailed. He also claimed damages to his factory through lost profits. He asserted (page 159):

"The mere fact that the increased rates were filed with the Commission and published by the defendants separately, does not exempt them from liability under the Anti-Trust Act for their unlawful acts in agreeing jointly upon the rates."

Apparently, it was his thought that the agreement and the rate effected by it could be dealt with separately. The court said (page 161):

"But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under §3, by injunction under §4, and by forfeiture under §6. That was settled by *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, and *United States* v. *Joint Traffic Association,* 171 U. S. 505. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government. It does not, however, follow that Keogh, a private shipper, may recover damages under §7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed. There are several reasons why he cannot."

It was pointed out that a rate is not necessarily illegal because it is the result of conspiracy in restraint of trade in violation of the Anti-Trust Act, that no violation of any of the plaintiff's legal rights had occurred because of the collection of the tariff rate, and, furthermore, that there was no proper basis for the determination of damages. The case clearly indicates that with respect to matters involving a rate or service subject to the jurisdiction of the Interstate Commerce Commission, only the Government may sue to enjoin the combination or agreement upon which it is based.

In the case of *General Investment Co.* v. *New York Cent. R. Co.,* 23 Fed. (2d) 822 (C. C. A. 6th), a contention somewhat analogous to that of the plaintiff in the case before us was made. The matter

there complained of was the consolidation of parallel railroads. It was suggested that the court might separate the intrastate business from the interstate business of the road, and apply the anti-trust laws of the State in so far as intrastate commerce was concerned. The court, after stating that the proviso of Section 16 of the Clayton Act applied whenever "any subject-matter pertaining to interstate commerce is vested in the Interstate Commerce Commission", that Congress had assumed jurisdiction of and legislated upon the subject-matter of the consolidation of railroad carriers doing an interstate business, and that the matter was within the jurisdiction of the Interstate Commerce Commission said (page 825):

"This being so, upon the allegations of plaintiff's bill, the alleged combination in restraint of intrastate commerce is so inextricably interwoven with the restraint of interstate commerce that it is impossible to render a judgment with respect thereto without at the same time adjudging as to the combination in restraint of interstate commerce. So to do would be indirectly permitting a private party to do that which it is forbidden to do directly."

So, in this case, it is apparent that to enjoin the carriers from performing the contract with the Columbia would result in permitting the plaintiff to do indirectly that which the proviso of Section 16 of the Clayton Act prohibits it from doing directly.

Our conclusion is that the suit brought by the plaintiff against these carriers is in respect of a matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission, and, therefore, that the court below was correct in holding that the plaintiff had not the right to bring it.

That being true, there is no occasion for our discussing the question as to whether the agreement between the carriers and the Columbia is violative of the anti-trust laws, since that question could properly be considered only in a suit in which injunctive relief was sought by the United States.

Affirmed.

Filed October 19, 1932.

181 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

October Term, 1932.

Tuesday, October 25, 1932.

Central Transfer Company, Appellant,
No. 9366. vs.
Terminal Railroad Association of St. Louis, Baltimore and Ohio Railroad Company, Chicago, Burlington and Quincy Railroad Company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Chicago, Rock Island and Pacific Railway Company, Illinois-Central Railroad Company, Louisville and Nashville Railroad Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, Southern Railway Company, St. Louis-San Francisco Railway Company, St. Louis Southwestern Railway Company, Wabash Railway Company, Mobile and Ohio Railroad Company, Illinois Terminal Company, Chicago and Eastern Illinois Railway Company, Pennsylvania Railroad Company, and Columbia Terminals Company, Corporations.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is
182 hereby, affirmed with costs; and that the appellees Terminal Railroad Association of St. Louis, et al., have and recover against the appellant Central Transfer Company the sum of Twenty Dollars for their costs herein and have execution therefor.

October 25, 1932.

(Points 7 and 21 of the Points and Authorities in, and Concluding Portion of, Brief of Appellant filed in Circuit Court of Appeals.)

At pages 46 and 50, respectively, and under the Caption "Points and Authorities" of the Statement, Brief and Ar-

gument for Appellant, filed in this cause, appears the following matter, to-wit:

"VII.

As the Columbia Company is a necessary and indispensable party to the relief plaintiff seeks, and as the Commission is without power to hail that company before it, it has no jurisdiction of this case.

Jennings vs. U. S., 264 Fed. 399 (49 U. S. C. A., sec. 1);

The Matter of the Legality of Tariffs etc., 91 I. C. C. 539, 546;

Pages 105 and 106 of the printed record."

"XXI.

This Court, under Section 16 of the Clayton Act, has jurisdiction to grant the relief prayed for, notwith-
183 standing the fact that carriers, subject to the jurisdiction of the Interstate Commerce Commission, are defendants. The presence of the Columbia Terminals Company as a proper and necessary party ousts the jurisdiction of the Commission, if it should have any in this case.

General Investment Securities Co. vs. N. Y. C. R. R. Co., 271 U. S. 228, 23 Fed. (2) 822;

Moore vs. N. Y. Cotton Exchange, 270 U. S. 593, 296 Fed. 61."

The following matter appears at the end of said "Statement, Brief and Agreement for Appellant", at pages 85, 86, and 87, to-wit:

"We recognize that with the execution of Plaintiff's Exhibit 10, and the filing of the amended tariffs, since the dismissal of plaintiff's bill, eliminating plaintiff's off-track stations, from said tariffs, and discontinuing its employment by the rail defendants, the situation with respect to the relief plaintiff may now be entitled to has somewhat changed. If the relief sought had been granted in the District Court, the defendants would have been perpetually enjoined from carrying out paragraphs 25, 26 and 27 of Exhibit 10, which obligated the several rail defendants to file the amended tariffs, and those tariffs would not have been filed, although their filing had not been specifically enjoined, and plaintiff would have been continued, indefinitely, in the employment of its former employers. That result would have been full and complete protection of the plaintiff in the prosecution

of its interstate transfer business. But the tariffs have been filed, and plaintiff is no longer in the employ of the rail defendants. We do not ask a mandatory injunction to compel said defendants to re-employ the plaintiff, or
184 to do the futile thing of withdrawnig its illegal tariff, but we do say that by allegation and proof plaintiff is entitled to the restoration of the status quo, in respect to its former employment by the rail defendants, in so far as it is within the power of this Court to bring that about. We think this may be done in a very effective measure by a proper decree of this Court. If the combination, formed by the defendants, to fire the plaintiff, and Exhibit 10 are illegal, then, of course, a decree should be entered to that effect, and such a decree would effectively untie the hands of these rail defendants, and leave them free to individually contract with the plaintiff, or any other transfer company, if any one or more of them might so desire, which they may not now do because of paragraphs 25 and 26 of Exhibit 10. In the event of the re-employment of plaintiff by any of the rail defendants, its employer or employers would be free to file an amended tariff or tariffs, designating therein plaintiff's off-track stations. The decree should include a perpetual injunction enjoining the defendants from forming or entering into any similar combination for the purpose of obstructing or interfering with the plaintiff in entering into contractual relations with the individual rail defendants, and from creating a monopoly and unduly restraining competition in said transfer business. If such a decree is entered, as is suggested here, then the plaintiff will have a full and fair opportunity of recovering the good will and patronage of its former employers.

"In support of our prayer for the suggested decree by this Court, we refer the Court to the decree entered in the case of U. S. vs. Terminal Railroad Assn., 224 U. S. 383, 411, and Terminal Railroad Assn. vs. U. S., 266 U. S. 17, 24, where the Supreme Court effected the identical result we are here seeking."

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185 (Praecipe for Transcript for Supreme Court, U. S. on Petition for Writ of Certiorari.)

To the Honorable Circuit Court of Appeals of the United States for the Eighth Circuit:

In certifying to the Supreme Court of the United States a full and complete transcript of the record and all proceedings in the above entitled cause, please include as a part

thereof Paragraphs 7 and 21, on pages 46 and 50, respectively, under the caption "Points and Authorities" of "Statement, Brief and Argument for Appellant", on file in said cause.

Also please certify the matter beginning on page 85 with the words "we recognize" and ending on page 87 with the words "we are here seeking", contained in said "Statement, Brief and Argument for Appellant".

Respectfully submitted,

CENTRAL TRANSFER COMPANY,
By Glendy B. Arnold, Its Counsel.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 1, 1932.

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186 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the praecipe of counsel for appellant, in a certain cause in said Circuit Court of Appeals wherein the Central Transfer Company was Appellant and the Terminal Railroad Association of St. Louis, et al., were Appellees, No. 9366, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of November, A. D. 1932.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court U.S.
NOV 23 1932
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 523

CENTRAL TRANSFER COMPANY,
PETITIONER,

v.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *et al.*,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GLENDY B. ARNOLD,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No.....

CENTRAL TRANSFER COMPANY,
PETITIONER,

v.

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS *et al.*,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Supreme Court of the United States:

Your petitioner, the Central Transfer Company, a corporation, respectfully presents to this Court this petition for a writ of certiorari, addressed to the Circuit Court of Appeals of the United States for the Eighth Circuit, commanding said Court and its clerk to certify to this Court the record and proceedings of the case in said court, wherein your petitioner was appellant and the Terminal

Railroad Association of St. Louis and sixteen other railroad defendants and a transfer company were appellees, numbered 9366, for review and determination by this Court.

STATEMENT OF THE MATTERS INVOLVED.

Your petitioner filed its bill in the District Court at St. Louis, Missouri, on August 24, 1931, against the respondents, as defendants, for temporary and permanent injunctive relief, under Sections 1 and 2 of the Sherman Antitrust Act, and Sec. 26, Title 15, U. S. C. A. (R. 2; Appendix 39). A preliminary injunction was granted, Judge Merrill E. Otis sitting specially, with bond in the sum of $15,000 (R. 16). After a trial on the merits, before Judge Charles B. Davis, the Court reversed Judge Otis, on the same state of facts, and dismissed the bill October 19, 1931, "with cost to the defendants," for want of legal capacity in plaintiff to sue for the relief prayed for, and because no violation of said Antitrust Act was shown (R. 38). Plaintiff appealed in due time (R. 39) and on October 25, 1932, this decree was affirmed by the Court of Appeals (R. 178) on the sole ground of petitioner's want of capacity to sue. The Court refused to consider the Antitrust issue (R. 177). The appellant, your petitioner, now seeks a review by this Court.

The bill charges that respondents, seventeen interstate railroad corporations, and their corespondent, the Colum-

bia Terminals Company, an interstate trucking corporation, had entered into and were about to carry out an unlawful contract, combination and conspiracy to destroy the interstate transfer or trucking business of your petitioner, carried on within and between the Cities of St. Louis, Missouri, and East St. Louis, Illinois (R. 7). Respondents deny the bill's allegations and plead a defense based on the priviso to Section 26 of Title 15, U. S. C. A., viz., want of legal capacity in petitioner to sue the respondent carriers, all being subject to the Interstate Commerce Act, Chapter 1, Title 49 (R. 16).

As petitioner's evidence was undisputed in the District Court, and the correctness of its statement of the facts in the Court of Appeals was unchallenged by respondents (R. 168), the cause was tried, in both courts, on what is tantamount to an agreed statement of the facts, which we summarize here.

All steam railroad lines, including respondent carriers, serving St. Louis, Missouri, and East St. Louis, Illinois, have, for more than twenty years, employed transfer or trucking companies to receive, deliver and transport for them, within and between said cities, their less-than-carload intra and interstate freight, originating at, destined to, and passing through said cities (R. 63, 69, 83). In a normal year the traffic amounts to about a million tons (R. 56).

At the time of the formation of the combination complained of four transfer companies, including petitioner

and respondent, Columbia Terminals Company, were and had been employed, for many years, by all of the rail respondents to handle this traffic (R. 62, 70); the movement of the greater bulk of it involved transportation across the state line (R. 70).

To perform the service the transfer companies maintained, at their own expense, their own freight depots, twelve in all, located in the business centers of said cities, and away from the rails of the carriers (R. 50). These off-track stations had to be and they were always designated in the official tariffs of the carriers as places where they will receive and deliver freight, and to and from which their line-haul rates apply (R. 49).

The contracts of employment between the carriers and the transfer companies were always in parol, always individual, never jointly made (R. 63, 75), each carrier, not the shipper, paying for the service rendered it (R. 59, 89), no carrier having any more interest in the service rendered the others than one shipper has in the service rendered other shippers by the same carrier. (See Plaintiff's Exs., 3, 4 and 5, R. 46 and 75.) Keen competition always existed among the transfer companies for the business of the shippers and receivers of the traffic, and the good will and business of the carriers (R. 43, 61).

For a number of years previous to the formation of the combination, in May, 1926 (R. 44, Ex. 2), the Columbia Company and a number of the executives and traffic officials of its corespondents, some of whom had a financial

interest in the success of the Columbia Company (R. 62, 65-66, 123), had diligently fostered a movement to give all of this business to the Columbia Company (R. 43-48, 59, 63, 64). The plan was to have all of the rail respondents enter into a mutual understanding that each would discontinue its individual employment of the petitioner and the other two competitors of the Columbia Company, and that each, independently of the others, would agree, in writing, with the latter to employ it alone, and no other transfer company, to handle its individual traffic (R. 44, 59, 61).

While the carriers were always free to hire and fire, at will, these transfer "agents" (R. 15), yet the Columbia Company, aided by the representatives of two or three lines, co-operating with it, had never been able to obtain, on a basis of efficiency, a complete monopoly of the business, after many years of effort. (See Plaintiff's Ex. 1, R. 44, and Maxwell's and Clark's testimony, R. 58 to 64.) So, the combination was formed for the specific purpose of securing unanimous action by the carriers in "firing" all of the competitors of the Columbia Company, and to enable the latter to obtain a complete monopoly of their individual transfer business. (See Maxwell's and Clark's evidence, R. 58-64, and the forms of contract originally agreed upon, R. 47).

To secure such unanimous action the Columbia Company, on July 17, 1925, made a written offer (R. 54) to its corespondents, except the Terminal Railroad Associa-

tion, to reduce its transfer rates 10 cents per ton, if all of them would designate in their several tariffs its off-track stations "as the only off-line stations they would use for receipt and delivery of freight" in St. Louis and East St. Louis, and individually, not jointly, "contract" with it for all truck service then performed for them by its competitors. That they might take advantage of this proffered reduction in the Columbia's rates, its offer was orally accepted by its corespondents, except two, at a meeting of their representatives on May 28, 1926, effective January 1, 1927. The two excepted respondents joined in the combination at a later date (R. 44, 59).

To put the plan into effect individual forms of contract for each carrier and the Columbia Company to sign were drafted and agreed upon by respondents (R. 46, 59), except the Terminal Association, who did not come into the picture until the spring of 1931 (R. 74). For some unexplained reason the respondents, in March, 1931 (R. 49, 74), abandoned their original plan to sign the individual agreements and on June 1, 1931, they had their corespondent, the Terminal Railroad Association, execute a single contract with the Columbia Company (Plaintiff's Ex. 10, R. 14, 49-50), covering the services provided for in the original individual agreements, the provisions of the single contract being substantially the same (R. 154). With some differences, unimportant here, the traffic was to be handled under Exhibit 10 in the same way as it had been handled for more than twenty years, and in the same

way it would have been under the individual contracts had they been executed instead. No new method or practice of handling the traffic is contemplated or provided for in said contract.

Petitioner contended Exhibit 10 to be a device to evade the Sherman Act, for the Terminal Company is merely a switching company, and does not and never has used this transfer service, assumes no obligation under its said contract, and is a dummy contractor.

In May, 1927, to make effective the individual contracts, prepared pursuant to the oral agreement of the combination in May, 1926, a tariff was filed, which omitted the off-track stations of petitioner (R. 49, 72). This tariff was protested, and suspended by the Commission, and that body, of its own motion, ordered a general investigation of the handling of the aforesaid traffic by the respondent carriers (R. 81), which continued over a period of four years, and was finally concluded July 27, 1931 (R. 163). After the Commission finally disposed of the case this bill was filed, heard and dismissed October 19, 1931. After its dismissal, the tariffs on file and the contract, Exhibit 10, went into effect November 1, 1931.

The direct and necessary effect of the combination and its oral agreement to fire the petitioner was to destroy 99 per cent of the business of your petitioner, valued at $250,000 (R. 63, 66, 70, 171), and from which it had a gross income of $300,000. Petitioner employed 100 persons, had a monthly pay roll of $12,500, and used fourteen tractors

and sixty-eight trailers, and maintained three off-track freight stations (R. 70). The respondents all understood that the immediate and obvious effect of the combination and its contracts upon the railroad business of petitioner would be to destroy it (R. 59, 61, 63), and the Court of Appeals so held (R. 171). The ultimate object of the carriers, in forming the combination, was to avail themselves of the reduced rates, and, so they say, to improve their service. The Columbia Company was after a monopoly of the business. The real motive of all of the respondents was profit.

At the trial the respondents offered in evidence reports of the Interstate Commerce Commission in the proceedings referred to above (R. 80, 143), and a letter of petitioner (R. 76) to the president of the Terminal Association, dated April 21, 1931, in which the petitioner, *after* the Commission had disposed of the case (R. 80), made a bid for the contract let to the Columbia Company, in response to what petitioner deemed a *pretended* call for bids, at that time, by the Terminal Association.

The only permanent relief petitioner sought, in the District Court, was a perpetual injunction to restrain the respondents from "firing" the petitioner and from carrying out the monopoly provisions of paragraphs 25 and 26 of their contract (Ex. 10, R. 52), obligating the carriers to designate the off-track stations of the Columbia Company as "*the only* 'off-track' stations of the railroads" and to deliver to the Columbia "*all*" of their less-than-carload

freight. If the words "only" and "all" had been deleted that contract would not have become involved in this case.

The Court of Appeals affirmed the decree of the District Court on the sole ground that petitioner had no right to sue under Section 16 of the Clayton Act, and declined to discuss the merits of the case (R. 177). It made no order directing the transfer of the case to the law side of the District Court.

REASONS FOR ISSUANCE OF THE WRIT.

I.

It is certain that the question of petitioner's right to sue these carriers, under Section 16 of the Clayton Act, on the facts of this record, has never been discussed or decided in any opinion of any of the Circuit Courts of Appeals or of this, the Supreme Court. The Court of Appeals was of that opinion (R. 175). It is, therefore, a new and important question for this Court to expressly decide.

II.

The ruling of the Court of Appeals that petitioner had no right to bring its bill is in conflict with the action of this Court and the Court of Appeals of the Second Circuit in taking full jurisdiction and deciding the case of Moore v. N. Y. Cotton Exchange et al., 296 Fed. 61, and 270 U. S. 593, that case having been cited and relied upon in the Court of Appeals by petitioner.

III.

As the subject matter of petitioner's bill is not within the jurisdiction of the Interstate Commerce Commission, the Court of Appeals erred in affirming the decree of the lower court on the ground that the proviso to Section 26, Title 15, U. S. C. A., denies petitioner the right to sue these carriers for injunctive relief.

IV.

If the subject matter of petitioner's bill is within the jurisdiction of the Commission, then the presence of the Columbia Company as an indispensable party ousted that jurisdiction. But the Court of Appeals erroneously failed and refused to pass upon that question, though expressly requested so to do (R. 179).

V.

The District Court erred in holding there was no violation of the Antitrust Act shown, and the Court of Appeals erred in not reversing this ruling.

VI.

If petitioner has no right to sue on the equity side of the Court, then the case should have been and should now be transferred to its law side.

VII.

The Court of Appeals erred in its statement of the facts upon which it based its conclusion that the subject matter of petitioner's bill was within the jurisdiction of the Interstate Commerce Commission.

VIII.

The Court of Appeals erred in holding: (a) That petitioner asked no relief against the Columbia Company (R. 171); (b) that rates and service of the carriers were involved (R. 172-173); (c) in holding that the subject matter of the controversy involved the adoption by the carriers of a method or practice of handling the less-than-carload traffic (R. 174); (d) in holding that the Interstate Commerce Commission's lack of jurisdiction "to name for the railroads the particular agency which shall perform the service is of no consequence" (R. 174); (e) in stating the scope and purpose of the general investigation conducted by the Interstate Commerce Commission (R. 170), and (f) in stating the conclusion reached by the Commission (R. 170).

IX.

The petitioner gave a preliminary injunction bond in the sum of $15,000 and the erroneous dismissal of its bill may subject it to an action for damages thereon (R. 18).

X.

The opinion of the Court of Appeals contains erroneous intimations that no violation of the Antitrust Act is shown (R. 174-175).

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Honorable Court, directed to the Circuit Court of Appeals of the United States for the Eighth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled in its docket, 9366, Central Transfer Company, Appellant, v. Terminal Railroad Association of St. Louis et al., Appellees, and that the said judgment or decree of the said Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

CENTRAL TRANSFER COMPANY,
By GLENDY B. ARNOLD,
Counsel for Petitioner,
418 Olive Street, St. Louis, Mo.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No.....

CENTRAL TRANSFER COMPANY,
PETITIONER,

v.

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS *et al.*,
RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The District Court filed no opinion in the case. The opinion of the Court of Appeals is not yet officially reported, but is printed in full in the record, beginning at page 168. It was rendered October 18, 1932.

II.

JURISDICTION.

(1) Section 347, Title 28, U. S. C. A., gives this Court jurisdiction to review any judgment or decree of the United States Circuit Court of Appeals for the Eighth Circuit.

(2) The date when the judgment of affirmance became final was October 18, 1932 (R. 178).

(3) Petitioner sought, in the District Court of the United States for the Eastern Judicial District of Missouri, preliminary and perpetual injunctive relief, under Section 26, Title 15, U. S. C. A. (Appendix 39), against a threatened irreparable loss and damage by a violation of Sections 1 and 2 of the Sherman Antitrust Act, being Sections 1 and 2 of Chapter 1 of Title 15, U. S. C. A. (R. 2-10) (Appendix 39). The bill was dismissed "with costs to the defendants" (R. 38), and on appeal it was affirmed by said Court of Appeals, as aforesaid.

(4) The jurisdiction of this Court to review the judgment of the Court of Appeals is sustained by Duplex Printing Press Co. v. Deering, 254 U. S. 443; Moore v. N. Y. Cotton Exchange et al., 270 U. S. 593, and Bedford Cut Stone Co. v. Journeymen's Stone Cutters Ass'n, 274 U. S. 37.

III.

STATEMENT OF THE CASE.

As a concise statement of the case is made in the petition for the writ, under the caption "Statement of the Matters Involved," it will not be repeated here.

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals erred in affirming the decree of the District Court for the reasons assigned in the petition for the issuance of the writ of certiorari.

ARGUMENT.

Summary of the Argument.

I.

Neither a federal court nor the Interstate Commerce Commission may enter a decree or make an order which would destroy the contract rights of the Columbia Company or these carriers unless they are parties to the proceedings.

Twining v. New Jersey, 211 U. S. 78;
Barney v. Baltimore, 6 Wall. 280;
Shields v. Barrow, 17 How. 130;
U. S. v. Northern Pac. R. Co., 134 Fed. 715.

As the Commission held that it had no jurisdiction of the Columbia (R. 105, 106), it has no jurisdiction of this case.

II.

Unless the Commission has power to make some administrative order in this case, it is not controlled by the proviso to Section 16 of the Clayton Act.

Great Northern R. Co. v. Merchants Elevator Co., 259 U. S. 70;
U. S. Navigation Co. v. Cunard S. S. Co., 7 U. S. Sup. Ct. Adv. Op. 300, 50 Fed. (2d) 83, 86.

III.

The Commission has no jurisdiction because no findings requiring technical knowledge are called for, only the construction of an oral agreement being involved.

Ibid.

IV.

If the combination and oral agreement to fire the petitioner were illegal, then filing of the tariff by the carriers, eliminating petitioner's off-track stations, was an illegal act. So, agreeing to enter into Exhibit 10, in so far as it tended to destroy petitioner's business, was an illegal act.

Tri-State Amusement Co. v. F. P. Highlands Amusement Co., 192 Mo. 404, 425;
Boston and Maine R. Co. v. Piper, 246 U. S. 439, 445;
Sage v. Hampe, 235 U. S. 99.

V.

An illegal tariff or contract cannot be made the basis for the exercise of jurisdiction by the Commission.

Sage v. Hampe, 235 U. S. 99.

VI.

Even if the Commission had jurisdiction, it has exhausted it, and its negative approval of the illegal oral

agreement to fire the petitioner is no bar to petitioner's right to injunctive relief.

Section 21, Title 15, U. S. C. A.;
Section 22, Title 49, U. S. C. A.;
U. S. Navigation Co. v. Cunard S. S. Co., 50 Fed. (2d) 83, 86.

VII.

The petitioner being engaged in the interstate transportation of freight is engaged in interstate commerce.

U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 312;
Addyston P. & S. Co. v. U. S., 175 U. S. 211, 241.

VIII.

There is no commerce so insignificant as not to be within the protection of the Sherman Antitrust Act.

U. S. v. Patterson, 222 Fed., l. c. 619;
O'Halloran v. Slate Co., 207 Fed., l. c. 191.

IX.

At common law petitioner has a legal right to the continuous enjoyment of its contractual relations with each of its employers and to protection against any combination or conspiracy to destroy it.

Hitchman Coal Co. v. Mitchell, 245 U. S. 229, 249.

X.

The Sherman Antitrust Act is the embodiment of the common law against illegal combinations, contracts and conspiracies for the protection of interstate trade and commerce.

Standard Oil Co. v. U. S., 221 U. S. 1, 59.

XI.

This combination and its oral agreement are violative of the Sherman Antitrust Act, under a ruling of this Court in a similar case.

U. S. v. Terminal R. Ass'n, 224 U. S. 383, 400, 411.

XII.

If the interstate trade and commerce of a hat and printing press manufacturer and a coal mine and quarry operator are within the protection of the Sherman Antitrust Act, then so is the business of petitioner.

Loewe v. Lawlor, 208 U. S. 274, 293;
Duplex Printing Press Co. v. Deering, 254 U. S. 443, 465;
Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295;
Bedford Cut Stone Co. v. Stone Cutters' Ass'n, 274 U. S. 37.

XIII.

Where the direct, necessary or intended result of the acts and contract of the combination is to destroy the interstate commerce of a complainant, the acts, contract and combination are all illegal under the Sherman Anti-trust Act.

U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290, 342;
Standard Oil Co. v. U. S., 221 U. S. 1, 65;
Duplex Printing Press Co. v. Deering, 254 U. S. 443;
Addyston P. & S. Co. v. U. S., 175 U. S. 177, 244;
U. S. v. Standard Oil Co., 173 Fed. 177, 188.

XIV.

Where the evidence shows beyond question that the direct, necessary and intended result of the acts of a combination is to destroy the interstate commerce of a complainant, the rule of reason has no application.

U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290, 340;
Standard Oil Co. v. U. S., 221 U. S. 1, 64;
U. S. v. American Tobacco Co., 221 U. S. 106, 179.

XV.

That the carriers were seeking to save money and to improve their service is no defense to this case.

U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290, 341.

XVI.

If petitioner has the right to sue, then injunction was the remedy.

Bedford Cut Stone Co. v. Stone Cutters' Assn., 274 U. S. 37.

Argument.

I.

Petitioner's Right to Sue.

The case of Moore v. N. Y. Cotton Exchange et al., supra, is authority for petitioner's right to sue these carrier respondents. The case was an injunction suit under Section 16 of the Clayton Act (Sec. 26, Title 15, U. S. C. A.) and the Sherman Anti-Trust Act. The Western Union and another telegraph company were codefendants and indispensable parties. The Western Union was and is a "common carrier, subject to the provisions of Chapter 1 of Title 49, Transportation," and within the terms of the proviso to said section of the Clayton Act, but the Cotton Exchange was not subject to the provisions of the Interstate Commerce Act, and, therefore, not subject to the jurisdiction of the Interstate Commerce Commission.

The District Court (291 Fed. 681), the Circuit Court of Appeals (296 Fed. 61) and this Court (270 U. S. 593) assumed full jurisdiction of that case and decided all ques-

tions presented therein, on the assumption that the plaintiff had a right to bring the suit under said section of the Clayton Act, notwithstanding the proviso thereto, and that the suit was against a common carrier subject to the Interstate Commerce Act. Whether jurisdiction was assumed because of the joinder of an indispensable party—the Cotton Exchange—not subject to the Interstate Commerce Act, or because the subject matter of the bill was, per se, not "in respect of any matter" over which the Commission had jurisdiction, does not appear from the opinion in the case. It must have been on one or the other, and may well have been on both grounds. Let us see.

Due process of law requires that all parties having rights in the controversy be made parties to any suit or proceeding, before any tribunal, which may impair or destroy such rights (Twining v. New Jersey, 211 U. S. 78; Barney v. Baltimore, 6 Wall. 280; Shields v. Barrow, 17 How. 130; U. S. v. Northern Pac. R. Co., 134 Fed. 715). Those cases hold that if a federal court is without power to decide as between the litigant parties because of the absence of an indispensable party, it should make no decree. Due process makes that rule applicable to the Commission.

Of course, the Commission had no jurisdiction of the New York Cotton Exchange and was powerless to summon it to answer any complaint of the plaintiff. The contract between that exchange and the telegraph companies could not be destroyed by any tribunal, on any ground, in the absence of the exchange as a party to the proceedings.

Although the Commission had jurisdiction of the telegraph companies, it could grant no relief against the Cotton Exchange, and for that reason the plaintiff could not bring the subject matter of the bill within the jurisdiction of the Commission, notwithstanding the fact that it was a suit, under Section 16 of the Clayton Act, to enjoin a threatened violation of the antitrust acts by a common carrier subject to the Interstate Commerce Act. Jurisdiction was, therefore, in the federal court, as a matter of course, and that is equally true of petitioner's case.

The Commission correctly held "that motor truck or wagon transfer companies performing terminal services for and on behalf of carriers are not common carriers subject to the (Interstate Commerce) act" (R. 105). The Court of Appeals made a similar ruling (R. 171). If this Court so holds, then the Commission is without power to summon the Columbia to answer any complaint of petitioner. Petitioner does not believe it could sue these carriers in a federal court or before the Commission on the facts alleged without joining the Columbia, nor could it sue the latter without joining the carriers. The relief sought, if granted, would have deprived the Columbia of its right, under paragraphs 25 and 26 of Exhibit 10 (R. 52), to take over the business of petitioner.

Notwithstanding the fact that plaintiff, in the Moore case, supra, was seeking, under Section 16 of the Clayton Act, to enjoin threatened violations of the antitrust acts by common carriers subject to the Interstate Commerce

Act, the subject matter of his bill did not involve violations of or call for the application of any of the provisions of the Interstate Commerce Act, although the contract which was the basis of the suit did involve the transmission of telegraphic messages, a subject matter within the jurisdiction of the Commission. In that respect petitioner's case is an exact parallel, as will presently be shown.

The Commission, upon the most persistent insistence of the respondents, expressly held that it was powerless to prevent these carriers from discontinuing, at will, the service of petitioner (R. 106). It further held that the carriers were free to select the agencies to perform this transfer service, and affirmed a previous ruling that it had no power over these trucking companies (R. 105). Those rulings are not reversed by the Court of Appeals. And, strange as it may seem, we lost this case on this point, in both courts below, with the carriers still insisting, in their answer (R. 15), that the Commission is without power to prevent them from firing petitioner, either singly or in combination.

The purpose of the proviso to Section 16 of the Clayton Act is to conserve the jurisdiction of the Commission and not merely to confer upon the carriers immunity from injunction suits by private parties for threatened violations of the antitrust acts. That conclusion is conclusively established by the terms of the proviso itself, and Section 11 of the Clayton Act (Sec. 21 of Title 15, U. S. C. A.), which

provides that "No order of the Commission * * * or the judgment of the Court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws." Said sections 11 and 16 are parts of the same act, adopted at the same time, and by section 1 (Sec. 12, Title 15, U. S. C. A.) the term "antitrust laws" is made to include Sections 1 and 2 of the Sherman Antitrust Act (Appendix 39).

Section 11 of the Clayton Act gives the Interstate Commerce Commission "Authority to enforce compliance with sections 13, 14, 18 and 19" of that act by common carriers. (Fruit Growers Express Inc. v. Federal Trade Com., 274 Fed. 205). Section 5 of the Interstate Commerce Act (Title 49, U. S. C. A.) gives the Commission power to relieve the carriers of certain other provisions of the antitrust acts, and perhaps to enforce some of them by affirmative orders. We think it is this jurisdiction of the Commission which the proviso to section 16 is intended to conserve.

As the Commission would be powerless, in this case, to relieve the carriers of the binding force of the antitrust acts, or to enforce them by any administrative orders, they are not sued here "in respect of any matter subject to the * * * jurisdiction" of the Commission, no administrative function being involved (Great Northern R. Co. v. Merchants Elevator Co., 259 U. S. 285; L. & N. R. Co. v. Cook Brewing Co., 223 U. S. 70). *Only the construction of an oral contract, the terms of which are admitted, is involved*

here, and under the authority of those cases petitioner had the right to sue.

We also think the necessary converse of the reasoning of this Court in U. S. Navigation Co. v. Cunard S. S. Co., supra, fully sustains this petitioner's right to sue. It is not likely that this Court would have sustained the dismissal of the bill in that case unless the Court had concluded that the Shipping Board had power to grant relief to the plaintiff.

The subject matter of the bill involves petitioner's right to enjoy the good will and patronage of its employers, in the conduct of its interstate transportation business, and protection of that right, under the Clayton and Sherman Antitrust Acts, against a combination and agreement formed and entered into by respondents, with the intention to destroy petitioner's said business (R. 61, 64).

The bill charges, and respondents admit, that the carriers combined and orally agreed, on May 28, 1926, that each carrier would discontinue its individual employment of petitioner, *knowing that such action would destroy petitioner's business* (R. 61, 64). Briefly stated, that is the whole subject matter of this bill. As the facts are undisputed, only an issue of law is presented for decision. Petitioner contends that the combination and its agreement are illegal, and respondents that they are not. No relief was sought in respect of any matter over which the Commission had any jurisdiction, and no lawful act or contract of respondents would have been enjoined.

The *subject matter* of the contract between the Columbia and the carriers, Exhibit 10 (R. 49), has nothing to do with the case, although the monopoly provisions in sections 25 and 26 thereof could not have been complied with if the relief petitioner sought had been granted. These simple terms, however, do not constitute the subject matter of that contract. They impliedly obligate the carriers to give petitioner's business to the Columbia and not to employ petitioner during the life of the contract. The performance of the oral agreement (R. 44, 49) and not Exhibit 10, signed five years afterwards (R. 50), is what destroyed petitioner's business. Performance of the oral agreement, without the execution or performance of Exhibit 10, would have destroyed petitioner's business. Like the subject matter of the plaintiff's bill in the Moore case, supra, the subject matter of petitioner's bill is not within the jurisdiction of the Commission, but further of this point.

The relief sought by petitioner would have merely preserved the status quo against the joint and illegal action of respondents in so far as it tended to destroy petitioner's business. Contrary to the opinion of the Court of Appeals (R. 172), it would have left both petitioner and the Columbia in the employ of the carriers. There would have been no interference at all with any of the provisions of their proposed contract, Exhibit 10, except those indirectly obligating the carriers not to use the service of petitioner, and they are contained, exclusively, in the

words "only" and "all" in paragraphs 25 and 26, respectively, of said exhibit (R. 52).

If this combination and the formal execution and final performance of its oral agreement to fire the petitioner violated Sections 1 and 2 of the Sherman Antitrust Act, then the filing of the tariff, eliminating petitioner's off-track stations and seeking the Commission's approval of the monopoly provisions of Exhibit 10 by the carriers were illegal acts (Boston and Maine R. Co. v. Piper, 246 U. S. 439; Tri-State Amusement Co. v. F. P. Highlands Amusement Co., 192 Mo. 405, 425), *unless the Interstate Commerce Commission was given power to legalize them, as held in Keogh v. Chicago and Northwestern Ry. Co., 260 U. S. 156.* The Commission has no such power—these respondents have never so contended, and the Court of Appeals did not so hold. An illegal contract or tariff cannot be made the basis of the exercise of valid jurisdiction by the Commission (Sage v. Hampe, 235 U. S. 99; Boston and Maine R. Co. v. Piper, supra).

If the Commission had jurisdiction of the subject matter of this controversy, it has exhausted that jurisdiction by its negative ruling that the combination and its proposed written agreement (Exhibit 10) are not violative of the Antitrust Act (R. 99). This Court is not bound by that ruling, for a number of obvious reasons (Section 21, Title 15, U. S. C. A.). It is not an order of the Commission (Brady v. I. C. C., 43 Fed. [2d] 847). It was not based on the facts of this case. The relief sought would not have impinged upon any order of the Commission.

II.

Illegal Combination.

That the Antitrust Act was violated is not fairly open to debate. While the Court of Appeals declined to pass on that question, yet it did make some adverse comments thereon. It overlooked a controlling factor in the case when it said:

> "It is not the agency selected by the carriers that is the real matter in controversy, but, rather, the adoption by the carriers jointly of a method or practice of handling less-than-carload freight * * *, which eliminates plaintiff as a competitor of the agency selected" (R. 174).

That brief statement, erroneous, as we believe it is, presents the crux of the whole argument. It is the joint action of the carriers which destroyed the business of petitioner and brought this case into court, for petitioner contends that such joint action was in direct violation of the Sherman Antitrust Act. If it were not, petitioner has no case.

At common law, petitioner had a legal right to the continued enjoyment of its contractual relations with the carriers and, if jurisdiction otherwise attached, to injunctive relief, in a federal court, against a threatened destruction of that right by a common-law conspiracy. In Hitchman Coal Co. v. Mitchell, 245 U. S. 229, 249, it is said:

> "Plaintiff having, in the exercise of its undoubted rights, established a working agreement between it and its employes, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was 'at will,' terminable by either party at any time, is of no consequence."

In the course of the opinion this Court also said:

> "In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, *or having that as its necessary effect*, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employes constitutes such a violation." (Italics ours.)

Illegal contracts, combinations and conspiracies in restraint of commerce and trade at common law are violative of the Sherman Antitrust Act when they involve commerce and trade among the several states (Standard Oil Co. v. U. S., 221 U. S. 1, 49). As the Hitchman Coal case did not involve interstate commerce, but was a suit to enjoin a conspiracy, at common law all that would be necessary to make it a controlling precedent for this case is the substitution of the word "employers" for the word "employes" in the above language of the opinion, for, under that decision, we have a common-law conspiracy here, which destroyed the transfer business of petitioner (R. 171), and, as it was interstate commerce, that fact makes the conspiracy a violation of the Antitrust Act.

If the interstate trade and business of a hat and printing press manufacturer and a coal and quarry operator are within the protection of the Sherman Antitrust Act, then so is the interstate transportation business of the petitioner (Loewe v. Lawlor, 208 U. S. 274, 293; Duplex Printing Press Co. v. Deering, 254 U. S. 440, 465; Coronado Coal Co. v. U. M. Workers of America, 268 U. S. 295; Bedford Cut Stone Co. v. Stonecutters' Assn., 274 U. S. 37). Surely these respondents are not privileged to do that which is unlawful when done by every other combination of private persons in the United States.

We think the combination complained of here and its contract has been condemned, in principle, by this Court in U. S. v. Terminal R. R. Assn., 224 U. S. 383. The Terminal Association was jointly owned by fifteen railroads, thirteen of which are respondents in this case. Each member of the association entered into the following stipulation with the association:

> "III. In consideration of the foregoing each of the proprietary companies, for itself only and not for others, accepts the right of joint use hereinbefore granted by the first party and hereby covenants and agrees that it will forever make use of the bridge and terminal properties of the first party, as above described, for all passenger and freight traffic within its territory through, to and from St. Louis and destined to cross the Mississippi River at St. Louis, and pay therefor as herein provided."

That stipulation, taken from the record in that case, was challenged by the Government as violative of the Sherman Antitrust Act, and this Court so held and ordered it stricken from the contracts of the association (loc. cit. 411). The only reason given by this Court for the elimination of the foregoing stipulation is contained in the following language, at page 400, viz.:

> "By still another clause in the agreement, the proprietary companies obligate themselves to forever use the facilities of the Terminal Company for all business destined to cross the river. This would seem to guarantee against any competitive system, since the companies to the agreement now control about one-third of the railroad mileage of the United States."

The Interstate Commerce Commission and the Court of Appeals conceded that the Terminal Association was engaged in the same business as these transfer companies, viz., terminal transportation of interstate freight, one by motor trucks and the other by rail (R. 99, 175). If the fifteen proprietary owners of the Terminal Association are forbidden by the Sherman Antitrust Act to combine and enter into a contract with the association for the purpose of preventing the establishment of a "competitive system" in the future, then why does not that rule forbid the owners of the Terminal Association from combining and agreeing among themselves and with the Columbia to destroy the competition and especially the business of this petitioner?

These carriers are certainly in no better position to form this combination than they would be if they owned all of the capital stock of the Columbia Company. If that were true, we do not believe the Antitrust Act would permit them to destroy the business of a competitor of the Columbia by combining and agreeing as they have done in this case. If they could, then a group of shippers could likewise combine and agree to give all of their individual freight to one carrier, to the destruction of its competitors. So, too, the nine Eastern carriers in this case could combine and agree to give all of their westbound business to one of the Western lines, to the destruction of its competitors.

Since the Terminal Association case was decided a most formidable competitor of the Association has come into existence in the Alton and Southern terminal company, and this could not have happened but for that decision. If the stipulation there condemned should be revived by a reversal of that case here, it would wreck the Alton & Southern as quickly as the contract here wrecked petitioner's business, as the Alton & Southern gets substantially all of its switching business from the owners of its competitor, the Terminal Association.

III.

Other Rulings of the Court of Appeals.

The Court characterizes the execution of Exhibit 10 as "the adoption by the carriers jointly of a method or prac-

tice of handling" this freight (R. 174). By the execution of that instrument the parties merely reduced to writing a contract, substantially all of the provisions of which had existed in parol for over twenty-five years (R. 63, 85), and which made no change in the method of receiving, delivering or moving the freight. What the carriers adopted "jointly" was not a practice, but an illegal oral agreement to fire the petitioner, and that has become "the real matter in controversy" here.

The Court said it was of no consequence that the Commission had no control over the carriers' discretion to select a transfer company to perform this service (R. 174). If the carriers were free in this respect, then is not the Commission without jurisdiction when they are charged with illegally exercising that discretion?

The Court erred in saying that, "apparently," "all that the carriers have done is to arrange jointly for the performance of a terminal service * * * not differing substantially from that performed by the Terminal Association with respect to carload freight" (R. 175).

That statement seems to be a comment on the merits of the case which the Court declined to consider (R. 177). Its import is not clear. Undoubtedly, as shown above, this Court declared illegal the stipulation between the carriers and the Terminal Association, providing for the latter's switching of their individual carload freight. If that is what the Court of Appeals means, we agree.

On the other hand, if the Court means that these carriers

have combined here to establish a joint facility as they did by consolidating the bridge and terminal properties into the Terminal Association, then the Court's comparison is not apposite.

This Court, in the Terminal Association Case, supra, made a clear distinction between the validity of the consolidation and the monopoly stipulation in the contracts of the consolidated company and its joint railroad owners. It sustained the consolidation upon the condition, among others, that the monopoly stipulation be stricken out, because it violated the Sherman Antitrust Act, *and that is the ruling we invoke in this case.*

The comparison is not apposite for another reason. The Terminal Association was jointly owned by the carriers, while there is nothing joint about the arrangement here, except the oral agreement to fire the petitioner and to sign Exhibit 10. That exhibit is a condensation of "Plaintiff's Exhibits 3, 4 and 5" (R. 116, 131, 154), which are the individual contracts the respondents intended to sign up until March, 1931 (R. 49, 59).

Exhibit 10 is not a joint contract. It is in almost the identical language of Exhibits 3, 4 and 5, one of which is in full at R. 131. It is simply *a device* whereby one transfer company is employed by sixteen carriers, under sixteen individual contracts, made by a common agent. The service of the Columbia is personal and confidential, each carrier paying its own bills, with no obligation to or

for its associates, and having no interest in the service performed for them (R. 75).

The Columbia is no more a joint facility of the carriers than it is such for the great number of others for whom it hauls freight. It is no more a joint facility now than it has been for over twenty-five years, as these carriers have employed it during that time. *The only substantial change made in that employment by Exhibit 10 was to take away petitioner's intrastate business and give it to the Columbia.*

It seems clear the Court erred in stating (R. 170) that the investigation of the Commission was "to determine the lawfulness of the methods proposed by the carriers for reducing the number of off-track stations." (See R. 89 and 94.) That issue was injected into the case afterwards (R. 99, 104).

The Court erred in saying, as did the author of the syllabus to the Commission's report (R. 81), that "the Commission reached the conclusion * * * that the proposals to reduce the number of off-track stations * * * would not be harmful to the public interest" (R. 170). The report itself shows it merely concluded that "experience alone will answer that question" (R. 98, 100).

That the Court erred in holding that petitioner "asks no relief against the Columbia" is shown at pages 10, 24 and 179 of the Record.

IV.

Disposition of the Case.

If the Court holds that petitioner has the right to bring this suit, we presume the Court will then pass on the merits of the case. If it be held that petitioner has no right to sue in equity, then petitioner requests that the decrees below be reversed, and the pleadings ordered amended and the case transferred to the law side of the District Court, under Rule 22 of the Equity Rules and Section 397, Title 28, U. S. C. A. (Appendix 40). White v. Sparkhill Realty Corporation, 280 U. S. 500, and Diamond Alkali Co. v. P. C. Thomson & Co., 35 Fed. (2d) 117, 120, where that was done by the appellate court *of its own motion*. The Court of Appeals erred in not determining that the evidence shows a case for the law side of the Court.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the decrees of the District Court and the Court of Appeals be reversed and justice done to petitioner, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Court of Appeals and finally reverse it.

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APPENDIX.

SHERMAN ANTITRUST ACT.

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 1, 26 Stat. 209.)" (U. S. C. A., Title 15.)

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 2, 26 Stat. 209.)" (ib.)

CLAYTON ANTITRUST ACT.

"Sec. 12. 'Antitrust laws,' as used in sections 12 to 27, inclusive, of this chapter, includes sections 1 to 27, inclusive, of this chapter. * * * (Oct. 15, 1914, c. 323, Sec. 1, 38 Stat. 730.)" (U. S. C. A., Title 15.)

"Sec. 26. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief,

in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this chapter, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapter 1 of Title 49, Transportation, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. (Oct. 15, 1914, c. 323, Sec. 16, 38 Stat. 737.)"

JUDICIAL CODE.

"Sec. 397. In case any United States court shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings

had been originally in the amended form. (Mar. 3, 1915, c. 90, 38 Stat. 956.)" (U. S. C. A., Title 28.)

TITLE 49, TRANSPORTATION.

"Section 22. Restriction. * * * and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; * * *."

EQUITY RULES.

"Rule 22. If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential. (See 28 U. S. C. A., Sec. 397.)"

FILE COPY

DEC 22

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 523.

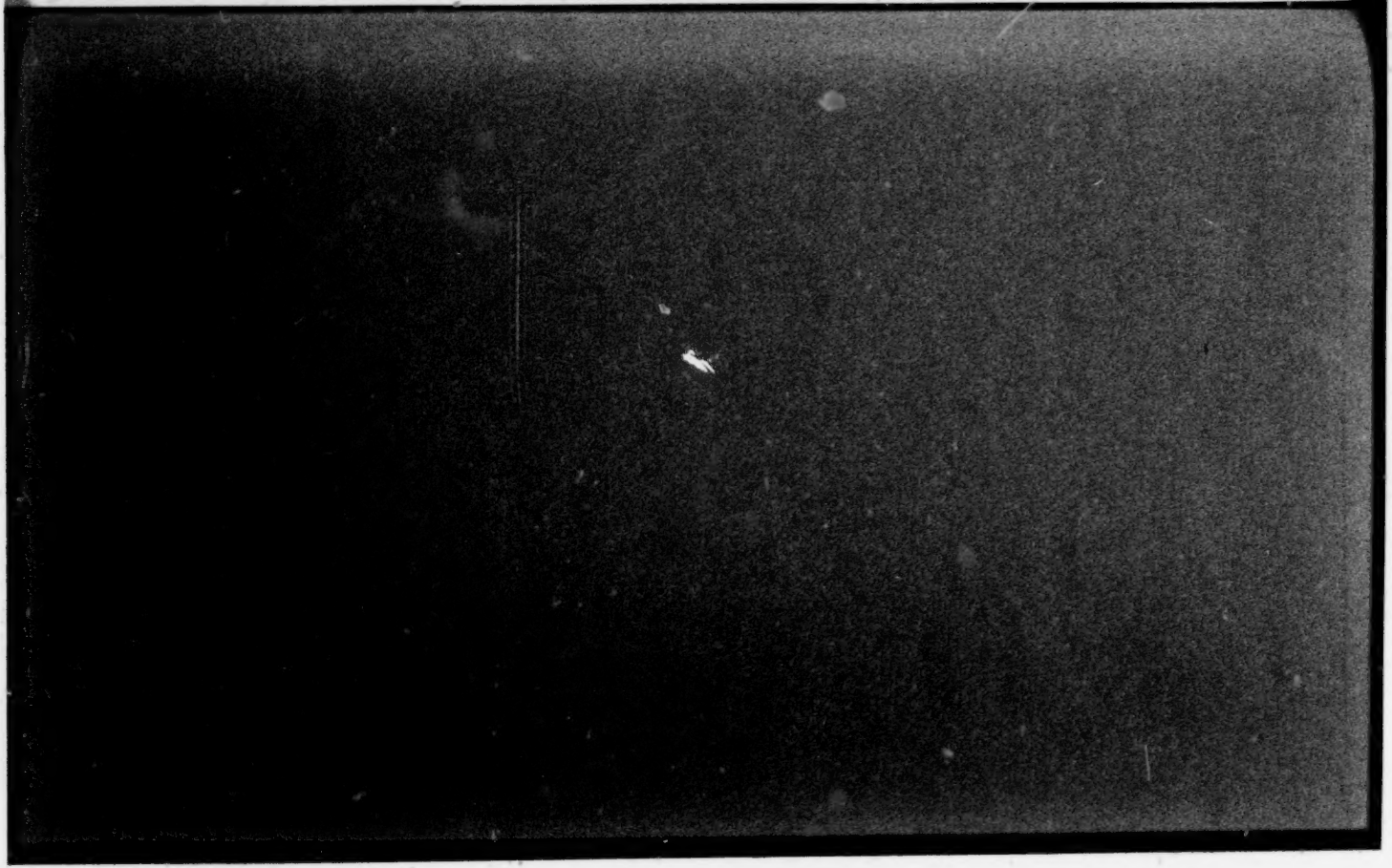
CENTRAL TRANSFER COMPANY,
PETITIONER,

v.

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS *et al.*,
RESPONDENTS.

PETITIONER'S REPLY BRIEF.

GLENDY B. ARNOLD,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES.

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TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS *et al.*,
RESPONDENTS.

PETITIONER'S REPLY BRIEF.

COMMENTS ON RESPONDENTS' STATEMENT.

I.

With an unimportant exception, no statement of fact in petitioner's statement of the matters involved is denied or disputed by the respondents' statement, nor is the legal effect of petitioner's statement of the facts in anywise altered by the supplemental matter in respondents' statement. Therefore, our statement of the matters involved amounts to an agreed statement of facts upon which the decision of the Court is to be based.

II.

Respondents (page 1) say: "This controversy has to do with methods employed by the carriers," etc. Respondents are still thinking of the case before the Commission. We are not concerned here with "methods," but only the legal right of respondents to combine to fire petitioner.

III.

At pages 3, 4 and 7 respondents undertake to justify their action in destroying the business of petitioner and other competitors of the Columbia by saying that certain abuses and waste had grown up in the handling of the traffic, and point to large savings to result from the elimination of competition. The abuses and waste consisted of a **clamor** for recogniton by other transfer companies than those employed and the employment of soliciting forces by the companies performing the services to solicit business in competition with each other. Neither the abuses or waste nor the savings are a defense here, and no combination or monopoly was necessary to put an end to the alleged abuses and wastes, for respondent carriers had the same power and control over the four transfer companies as they now have over the one.

Respondents would have us believe that by employing the Columbia Company the Missouri Pacific and Frisco and other west-side lines would wholly or partially abandon the use of certain off-track stations, and thereby save annually $125,000, but the record affirmatively shows that it was not necessary to destroy the business of the Columbia's competitors in order to effect these savings (R. 75). So the only justification left is the annual savings resulting from a reduction in the Columbia's rates, but that is no defense for violation of the Antitrust Act.

IV.

The carrier respondents would also have us believe that the one-transfer plan was a railroad plan, but Mr. Commissioner Eastman was of a different opinion. In his separate report (R. 123) he said:

> "It appears that it (the one-transfer plan) has been conceived and negotiated in part under the auspices of officers of respondents who had and have a direct financial interest in the Columbia Terminals Company or an affiliated company. I do not at all agree with the majority in passing lightly over this espisode. It was without excuse whatever the outcome of the negotiations."

The learned Commissioner then goes on to show the hand of the Columbia in the work of the combination.

Mr. Hart of the Baltimore & Ohio, a stockholder in the Columbia, was one of the original and ardent advocates of the plan (R. 43, 65). (See also R. 62.) Some idea of the Columbia's interest in promoting the combination may be gathered from the fact that it paid $375,000 just to silence the opposition of two of its competitors (R. 65), and was willing to buy out this petitioner just to silence it (R. 67, 68). It paid $250,000 for the equipment of the Fidelity Transfer Company and $125,000 for a controlling interest in the McMahon Company (R. 65) when it did not need the equipment of either (R. 74), and would take over all of their railroad hauling under its contract.

V.

We concede the venial error of stating, at page 2 of our petition, that a preliminary injunction was issued by Judge Otis. It was a temporary restraining order.

RESPONDENTS' ARGUMENT.

I.

At page 18 respondents stress the fact that Section 6 of the Interstate Commerce Act requires them to designate these off-track stations in their tariffs. That section lays no such burden upon members of a conspiracy.

II.

Respondents, page 19, say: "If respondents are enjoined from carrying out the provisions of the contract attacked, what becomes of the tariffs on file with the Commission?" The answer: The tariffs would have been withdrawn as a necessary act of obedience to the injunction, and that would have left the old tariffs in effect, with petitioner's stations designated therein. At the time of the trial petitioner was still in the employ of respondents. In such circumstances there would have been no occasion for filing any new tariffs or for any order to "restore the places of business of petitioner as off-track stations," as suggested by respondents.

III.

As respondents say, page 20, we did and do now concede that the Commission has jurisdiction of the services of these transfer companies, and we assert again, and respondents now concede, that the Commission "has no jurisdiction to control the carriers' discretion in selecting their agents to perform the service." We now suggest: **If the Commission has no jurisdiction of this discretion of the carriers, has the Commission any jurisdiction of a cause of action arising out of the unlawful exercise of such discretion? We say no.**

IV.

At pages 20 and 21 respondents call attention to the appellate court's statement of our theory of the case. We have the following comments to make on the quotation respondents have made there from the opinion of the Court of Appeals:

(a) We think that paragraph of the Court's opinion erroneous. We respectfully submit that the learned court misconceived our theory, and we believe that fact is shown by our statement of the facts in the petition for the writ of certiorari, the statement of the facts contained in the bill, the prayers for relief, as stated in the bill (R. 10) and suggested, in our brief, to the appellate court (R. 179-180).

(b) We do not think the record shows that the "cost" of the services performed by the transfer companies is "reflected in the rates contained in the tariffs filed with the Commission." The **allowances** paid transfer companies are not mentioned in the tariffs, and the reduction of the Columbia's rates is not reflected in the line haul rates.

(c) We find no contention in our briefs to the effect that the agreement for the services of the Columbia is not a matter subject to the jurisdiction of the Commission. What we said was that the combination and its oral agreement to fire petitioner are not within the jurisdiction of the Commission, and, therefore, a suit to enjoin its performance is not one in respect of a matter within the jurisdiction of the Commission.

(d) We can find no assertion and recall none to the effect "that the Court may prevent the carrying out of the contract (Exhibit 10) without affecting the services to be performed or the rates to be charged for such services."

If we ever made such a contention it was an obvious error, and we do not repeat it here for the plain reason that the relief we sought would have necessarily affected the services to be performed by the Columbia, under Exhibit 10, but only to the extent of preventing it from taking over the business of petitioner. If we had won, shippers would have continued as they had done for many years, to use the Columbia's stations as well as ours. We do not understand how it was possible for us to have made the assertion ascribed to us by the appellate court.

(e) We have never contended that "the Court can enjoin the carriers from establishing off-track stations at the places of business of the Columbia, as provided by the contract, but leave the tariffs designating such stations undisturbed." We only sought to prevent abandonment of petitioner's stations, and, obviously, that could have been done without **disturbing** the Columbia's stations, as designated in the tariffs, both old and new. We do not recall ever having thought of or suggested that the Court could "enjoin the carriers from establishing off-track stations at the places of business of the Columbia."

(f) We have never contended that the "Court may enjoin the carriers from employing the Columbia as their sole transfer agent, and yet leave undisturbed the service which the Columbia is to perform for the carriers at a stipulated cost, as well as the tariffs which reflect the cost of service." Our contention was that they cannot combine to fire us. Of course, the relief sought, if granted, would have disturbed the services **to be** performed in the future under Exhibit 10, but only to the extent stated in paragraph (d) above. Certainly that relief would have forced a withdrawal of the tariffs eliminating petitioner's stations.

Naturally the Columbia would not have been the sole agent if we had won.

We do not think the "Court of Appeals correctly describes our theory of the case," as respondents say.

V.

At page 22 respondents say "that this controversy, being one of rates and transportation under such rates, is for the Commission." No rates are involved.

VI.

At pages 24 and 25 respondents' statement that we contend the Commission has no jurisdiction over the contract by which the carriers employed the Columbia is erroneous. We have stated repeatedly that the Commission has jurisdiction over the services called for in that contract, and to that extent it has jurisdiction of the contract itself, but that is not saying that there may not be provisions of the contract over which the Commission has no jurisdiction. In fact, there are two such provisions in this contract. They are contained exclusively in the words "only" and "all" in paragraphs 25 and 26, respectively, of Exhibit 10 (R. 52), which impliedly obligate the carriers to discontinue their employment of petitioner. Agreement upon and performance of those provisions are matters over which the Commission has no power or control.

VII.

At page 32 respondents say that Moore v. New York Cotton Exchange et al. "is not even remotely analogous to the case at bar." They ignore the facts that two of the defendants in that case were common carriers subject to the provisions of the Interstate Commerce Act, and that

the contract between those carriers and the New York Cotton Exchange, which gave rise to the controversy, provided for the interstate transmission of telegraphic information, a subject matter generally within the regulatory powers and jurisdiction of the Commission, and that it was a case to cancel said contract as violative of the Sherman Antitrust Act.

At page 39 respondents, "to refute the assertion that the purpose of the one-transfer plan is to destroy the business of petitioner," quote testimony to show that "one purpose of the carriers in arriving at the one-transfer plan is to determine for themselves where the off-track station should be located and who should operate it." That testimony is obviously incorrect. No combination was necessary to enable respondents to do that. They cite a number of cases upholding that power in **each** carrier.

VIII.

Beginning at page 43 much space is consumed by respondents to demonstrate that a carrier "has full liberty to select its own agents to perform transportation service on its behalf," a proposition never controverted by us at any time. Eight pages (43-50) are devoted to a discussion of Skaggs et al. v. Kansas City Terminal Railway Co. et al., 233 Fed. 827, and Donovan v. The Pennsylvania Co., 199 U. S. 280. A great number of other cases are cited to sustain this contention and grouped with the Skaggs and Donovan cases at page 16 of respondents' brief.

An examination of those cases will disclose that they are inapplicable to any legal point or proposition in petitioner's case. They involve the right of individual railroads and a terminal company, at common law, to make

exclusive contracts for the use of **company property** for carrying on the taxicab and express business, for the interchange of freight by connecting carriers, and for the hauling of freight by a transfer company. The Serman Act was involved in only one of them, the Skaggs case. No unlawful combination or conspiracy to destroy the business of a private corporation was charged in any of them.

Respondents seem to think that what one carrier may do in making exclusive contracts with taxicab and transfer companies, a number of carriers may combine and do when the intended result is to destroy the private interstate business of an individual or a private corporation.

IX.

Respondents, beginning at page 51, make a long analysis of United States v. Terminal Railroad Assn., 224 U. S. 383, and quote from the report of the Interstate Commerce Commission (R. 99) to sustain their contention that that case is authority for what they have done in this case. They do not, however, answer the contention that this Court held in the Terminal case that the proprietary lines could not agree among themselves to give all of their switching business to the Terminal Association, their jointly owned facility. That is the only proposition in the Terminal case in which we have any interest.

We have always thought, and contended in the Court of Appeals, that the construction of the Terminal case by the Interstate Commerce Commission was erroneous, but whether erroneous or not the conclusions of the Commission in regard to that case are not applicable here. In the proceedings before the Commission, the Chamber of Commerce, one of the protestants, urged upon the Commission the contention that, on the record there before it, the

combination and its **oral agreement** involved in the instant case were in violation of the Sherman Antitrust Act (R. 99). However, the Commission's report shows that, legally, no such case as is presented here was presented to the Commission by either the Chamber of Commerce or this petitioner. The Chamber of Commerce argued the matter from a public standpoint, and not in defense of the rights of any particular private party to that proceeding. It is quite clear that the Commission considered only the effect of the monopoly upon the general public interest, and gave no weight to its effect upon the private business of this petitioner.

If we have correctly construed the Terminal case at pages 31-33 of our brief in support of the petition, then we are confident that the conclusions of the Commission in regard to that case can have no bearing on this case.

X.

Disposition of the Case.

We do not think that respondents have demonstrated that this case should not be transferred to the law side of the court if the Court holds that the petitioner has not the right to bring the suit.

If the case is one for the law side of the court we have not lost our right to have it transferred by failing to move below to have that done (Diamond Alleoli Co. v. P. C. Thomson & Co., 35 Fed. [2d] 117, 120).

XI.

Our Own Errors.

We wish to correct two errors in our original brief in support of the petition.

At page 23 we inadvertently stated that Moore v. New York Cotton Exchange et al. was a suit "to enjoin a threatened violation of the Antitrust Acts" and "to enjoin threatened violations of the Antitrust Acts." At page 603 of the opinion of this Court in that case it is stated:

> "The prayer is for a decree canceling the Western Union contract, adjudging the New York Cotton Exchange to be a monopoly, restraining appellees from refusing to install a ticker and furnish the Odd-Lot and its members as they do others, with continuous cotton quotations, and for other relief."

We have requested the clerk to ink out the word "threatened" in the sixth line from the top of page 23 of our brief, and the same word in the line next to the last one on said page.

At page 36 of our brief, in the ninth line from the top of the page, the word "intrastate" should be "interstate," and we request the clerk to make this correction.

Respectfully submitted,

GLENDY B. ARNOLD,
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St. Louis, Mo.,
Counsel for Petitioner.

December 20, 1932.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 523.

CENTRAL TRANSFER COMPANY,
Petitioner,

v.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 523.

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v.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

STATEMENT.

In view of omissions and inaccuracies appearing in the statement of petitioner, respondents submit the following:

This controversy has to do with the methods employed by carriers by railroad serving St. Louis, Missouri, and East St. Louis, Illinois, sometimes referred to as the St. Louis-East St. Louis switching district, in connection with the receipt, delivery and interchange of less-than-carload freight.

Notwithstanding the various bridges, traffic has been handled by dray or truck between St. Louis and East St. Louis since 1854 (R. 83). Two methods of receiving and delivering less-than-carload freight have been and are employed, viz., through off-track stations designated by the carriers in tariffs filed with the Interstate Commerce Commission, hereinafter referred to as the Commission, and maintained and operated by transfer companies and by the so-called direct delivery plan under which traffic passes through a constructive station on its journey to and from the trader's place of business, from and to the on-track stations in East St. Louis.

During the early period of the transfer of less-than-carload freight between St. Louis and East St. Louis the charges for such transriver service were added to the rail rates to and from East St. Louis. Through various steps the rates of the carriers were extended to St. Louis and such transriver service from that time on was made by the carriers and the charges therefor included in their line-haul rates (R. 84).

When this practice was established off-track stations became stations designated in the tariffs where freight would be received and delivered in the same manner as though they were located on the tracks of the carriers.

The contract assailed in the bill of complaint (R. 49) to which we shall hereinafter refer, in so far as this proceeding is concerned, has to do with the handling of less-than-carload freight between on-track stations of the car-

riers and between off-track and on-track stations of such carriers, although petitioner disclaims any concern or interest in traffic moving between on-track stations (R. 71).

The less-than-carload traffic moving between on-track stations of the carriers is what is known as interchange traffic and may be described generally as traffic moving to East St. Louis over the line of a carrier terminating at that point and transported by dray or truck ~~from~~ to the on-track station of a carrier whose lines extend westerly from St. Louis.

As to less-than-carload traffic moving between off-track and on-track stations of the carriers the following is illustrative: The rails of important lines, such as the Baltimore and Ohio, end in East St. Louis, but by their tariffs these carriers provide rates to and from St. Louis on the same basis as applicable to and from East St. Louis. They, therefore, hold themselves out to deliver at and ship from St. Louis, and, not having their own rails to St. Louis, employ other means of performing the service between the ends of their rails and St. Louis. Such means consist of off-track stations established at points in St. Louis between which and their rails or on-track stations in St. Louis less-than-carload traffic is hauled by dray or truck and at the expense of such carriers.

The carriers, for several years prior to May, 1927, had been considering the method in which less-than-carload freight was being handled in the St. Louis-East St. Louis switching district looking towards a discontinuance by such

carriers of allowances to numerous transfer companies and contracting for the service in question with only one transfer company (R. 43).

Especially were such carriers concerned regarding what they considered waste and abuses that had grown up during the years in connection with the handling by drays or trucks of less-than-carload freight between off-track and on-track stations in such district, including the increased number of such off-track stations. In the opinion of some of the carriers the situation as far back as March, 1923, was admittedly bad and was resulting in unnecessary costs to the railroads of thousands of dollars annually. As far back as the date last mentioned transfer companies other than those then employed were in the field clamoring for recognition, and it was the thought of some of the carriers that the desired results could be obtained by confining the traffic to one trucking company (R. 43).

Another abuse was the performance of the transfer companies employing soliciting forces to compete with each other to see which one of them would do the hauling for the carriers. The expense of such method was applied to operations and ultimately borne by the carriers who employed the transfer companies as their agents. In some cases where off-track stations were located across the street from on-track stations of the carriers the haul performed by the trucking company would be only across the street from the off-track station to the on-track station (R. 73, 74).

In the opinion of the carriers the elimination of such duplication would have the effect of bringing about savings to such carriers (R. 74).

Also, one purpose of the carriers in arriving at the one-transfer plan was to determine for themselves where a given off-track station should be located and how it should be operated (R. 73).

In response to numerous petitions filed with the Interstate Commerce Commission by certain teaming associations, transfer companies and others, the Commission, on May 2, 1927, ordered a general investigation concerning the lawfulness and methods then in effect at St. Louis and East St. Louis having to do with the receipt and delivery by dray or truck of less-than-carload freight at those points.

During May, 1927, the carriers, through their joint publishing agent, filed with the Commission their tariff effective July 1, 1927, whereby it was proposed to reduce the number of off-track stations then in existence at St. Louis from twelve to seven, and to reduce such stations at East St. Louis from two to one (R. 49, 93).

The tariff referred to was suspended by the Commission for the statutory period (seven months) and the Commission entered upon an investigation as to the lawfulness of such tariff.

The issues involved in the general investigation ordered by the Commission heretofore referred to and the issues involved in the investigation of the schedules heretofore

mentioned were consolidated and, commencing on November 1, 1927, a lengthy hearing was held concerning the practices of the carriers by railroad in connection with the receipt and delivery of less-than-carload freight at St. Louis and East St. Louis and concerning the lawfulness of the schedules contained in the tariff in question.

Following such investigation and hearing incident thereto, a report was handed down by the Commission dated May 13, 1929 (R. 80). In such report the Commission found:

1. That the proposal of the carriers, other than the Chicago and Alton, to employ a single transfer company for the operation of off-track stations and the hauling between such stations and the on-track stations of the railroads, and in the interchange of freight between railroads, is not violative of any provision of the Interstate Commerce Act.

2. That the proposal of the carriers, other than the Alton, to reduce the number of off-track stations in St. Louis from twelve to seven and at East St. Louis from three to two will not be harmful to the public interest or result in unreasonable and inadequate service.

The Commission, however, declined to approve the allowances proposed to be paid for such service on the ground that such allowances were not based upon a cost study, and required the carriers to make a cost study and submit the results thereof to the Commission.

A further hearing was held, and following such further hearing the Commission, on July 27, 1931, handed down its second report and order (R. 143).

In such second report and order the Commission found (R. 150) that, based upon 830,514 tons, which the carriers stated was the total off-track and interchange service for a normal year, the reduced rates provided in the new contract would result in the saving of $181,398.37 annually. It further found that it was estimated that the discontinuance of the use of off-track stations by the St. Louis-San Francisco and Missouri Pacific and the partial discontinuance of the use of such stations by the other west-side lines, as provided in the new contract, would effect an annual saving of $125,000, or a total saving of $306,398.37.

The allowances, therefore, to be made by the carriers for the services to be performed were approved by the Commission.

On June 1, 1931, the carriers and the Columbia Terminals Company entered into the contract assailed in the bill of complaint (R. 49).

Less-than-carload traffic covered by such contract, in so far as at present material, may be described as follows:

> "(a) Between 'on-track' freight stations of the railroads in St. Louis, Missouri, and the said 'off-track' freight stations in East St. Louis, Illinois.
>
> "(b) Between 'on-track' freight stations of the rail-

roads in East St. Louis, Illinois, and the said 'off-track' freight stations in St. Louis, Missouri.

"(c) From the said 'off-track' freight stations of the railroads in St. Louis, Missouri, to the 'on-track' freight stations in St. Louis, Missouri.

"(d) Between 'on-track' freight stations of the railroads located in St. Louis, Missouri (interchange service).

"(e) Between 'on-track' freight stations of the railroads located in East St. Louis, Illinois (interchange service).

"(f) Between 'on-track' freight stations in St. Louis, Missouri, and 'on-track' freight stations in East St. Louis, Illinois (interchange service)."

The effect of the contract was to confine the handling of less-than-carload traffic between on-track stations and between the off-track and on-track stations of the carriers within the St. Louis-East St. Louis switching district to one transfer company, the Columbia Terminals Company. The contract also reduced the number of off-track stations at St. Louis from twelve to seven, and East St. Louis from two to one. Also, the carriers agreed to file the necessary tariff schedules with the Interstate Commerce Commission and appropriate state commissions.

It should also be stated that by letter dated April 21, 1931, the Central Transfer Company, petitioner herein, through its vice-president and general manager, submitted to the president of the Terminal Railroad Asso-

ciation of St. Louis its bid, asking to be permitted to contract as the sole transfer agent of the carriers for the transportation of less-than-carload freight now being handled by the Columbia Terminals Company through the contract heretofore referred to (R. 76).

On the 21st day of August, 1931, petitioner filed its bill of complaint in the United States District Court at St. Louis, Missouri, alleging a violation of Sections 1 and 2 of the Sherman Act, and praying temporary and permanent injunctive relief under Sec. 26, Title 15, U. S. C. A. (R. 2-10).

When petitioner's bill was filed the two regular Judges were out of the district and the case was especially assigned to Judge Merrill E. Otis.

On page 2 of the petition for writ of certiorari it is stated that a preliminary injunction was granted by Judge Merrill E. Otis, sitting specially, with bond fixed in the sum of $15,000.00. This statement is incorrect. A temporary restraining order only was issued at Kansas City, Missouri (R. 16, 17, 18), and such temporary restraining order was issued for the purpose only of maintaining the status quo until the plaintiff "shall have had an opportunity to present to one of the Judges of the United States District Court for the Eastern District of Missouri its application for a temporary injunction" (R. 18).

On September 21, 1931, the cause came on to be heard on motion for preliminary injunction, and, upon stipulation of the parties, was tried on its merits before Judge

Charles B. Davis at St. Louis, argued orally and submitted on briefs, and findings of fact and conclusions of law proposed by the parties thereto.

On October 19, 1931 (R. 38), the District Court handed down its findings of fact and conclusions of law, denied plaintiff the relief prayed for, and entered its final decree dismissing plaintiff's bill. Thereafter the tariffs in question went into effect.

The District Court held:

1. That the matter involved is subject to the regulation and supervision of the Interstate Commerce Commission, and that petitioner is not entitled to the injunctive relief sought.

2. That the contract assailed in the bill of complaint was not in violation of the antitrust laws of the United States.

On appeal to the Circuit Court of Appeals, Eighth Circuit, the decree of the District Court was affirmed (R. 178).

SUMMARY OF THE ARGUMENT.

I.

The Clayton Act confers upon any person, firm, corporation or association the right to sue for and have injunctive relief against threatened loss or damage by a violation of the Antitrust Laws, with the proviso that "nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of Chapter 1 of Title 49, Transportation, in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission."

Clayton Act (U. S. C. A., Title 15, Sec. 26).

II.

The Interstate Commerce Commission has authority to inquire into the management of the business of all common carriers subject to the provisions of the Interstate Commerce Act, is in terms required to execute and enforce the provisions of such act, and the investigating and supervising powers of such Commission extend to all of the activities of carriers subject to the Interstate Commerce Act and to all sums expended by them which could affect in any

way their benefit or burden as agents of the public. Such powers must necessarily be expressed in generalities.

Interstate Commerce Act, Section 12 (1) (U. S. C. A., Title 49, Sec. 12);
Smith v. Interstate Commerce Commission, 245 U. S. 33.

III.

Transportation is defined to include locomotives, cars, vehicles, vessels and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, expressed or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, storage and handling of property transported. This includes such service as would be performed by trucking companies as employes of the carriers in handling less-than-carload freight in terminal service.

Interstate Commerce Act, Section 1 (3) (U. S. C. A., Title 49, Sec. 1);
In the Matter of Legality of Tariffs Embracing Motor Trucks, etc., 91 I. C. C. Rep. 539.

IV.

The service between on-track stations of the carriers performed by trucks as employes of such carriers constitutes interchange service and is within the control and supervision of the Interstate Commerce Commission.

Interstate Commerce Act, Section 3 (3) (U. S. C. A., Title 49, Sec. 3);
Pennsylvania v. United States, 236 U. S. 351.

V.

Carriers by railroad are required to file with the Commission schedules showing the application of their line-haul rates, to what points such rates apply, and showing the services the carriers undertake to perform under their published rates, by the following provisions of the Interstate Commerce Act:

Interstate Commerce Act, Section 1 (6) (U. S. C. A., Title 49, Sec. 1);
Interstate Commerce Act, Section 1 (12) (U. S. C. A., Title 49, Sec. 1);
Interstate Commerce Act, Section 1 (13) (U. S. C. A., Title 49, Sec. 1);
Interstate Commerce Act, Section 6 (1) (U. S. C. A., Title 49, Sec. 6);
Interstate Commerce Act, Section 15 (7) (U. S. C. A., Title 49, Sec. 15).

VI.

Petitioner seeks an injunction to prevent the carriers from applying rates duly filed with the Commission, since the only method by which the carriers can establish or eliminate an off-track station is through the filing with such Commission of tariffs designating off-track stations from and to which their rates will apply.

In so far as the movement of less-than-carload freight is concerned between off-track and on-track stations of the

carriers, the matter in controversy concerns only rates filed with the Commission, which question is committed to the jurisdiction of the Commission.

Texas and Pacific Rwy. Co. v. Abilene Cotton Oil Co., 204 U. S. 426;
Baltimore & Ohio R. R. v. Pitcairn Coal Co., 215 U. S. 482;
Transfer of Freight Within St. Louis, etc., 155 I. C. C. Rep. 129;
Trucking Less-Than-Carload Freight, etc., 185 I. C. C. Rep. 71;
Co-ordination of Motor Transportation, 182 I. C. C. Rep., l. c. 367;
Discontinuance of Off-Track Stations in New York City, 173 I. C. C. Rep. 727, 730;
Northern Pacific Rwy. Co. v. Solum, 247 U. S. 477;
Procter and Gamble v. U. S., 225 U. S. 282;
Motor Bus and Motor Truck Operation, 140 I. C. C. Rep., l. c. 729.

VII.

The contemporaneous construction of a statute by those charged with execution and application, especially when it has long prevailed, while not controlling, is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it be clear that such construction is erroneous.

United States v. Finell, 185 U. S. 235;
New York etc. R. Co. v. Interstate Commerce Commission, 200 U. S. 361;
California v. Deseret Water Co., 243 U. S. 415.

VIII.

The matter in controversy being subject therefore to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission, petitioner is not entitled to bring an action in equity for injunctive relief against respondents, common carriers by railroad subject to the provisions of the Interstate Commerce Act, because of an alleged violation of the Antitrust Laws of the United States.

Midland Valley R. R. v. Barkley, 276 U. S. 483;
General Investment Company v. New York Central R. R. Co., 271 U. S. 228;
Keogh v. C. & N. W. Ry. Co., 260 U. S. 156;
Wheeling & L. E. Rwy. Co. v. Pittsburgh & W. Va. Rwy. Co., 33 Fed. (2d) 390, 280 U. S. 593;
U. S. Nav. Co. v. Cunard S. S. Co., 50 Fed. (2d) 83, 7 U. S. Sup. Ct. Adv. Op. 300;
Morrisdale Coal Company v. Pennsylvania R. R. Co., 230 U. S. 304;
General Investment Company v. New York Central R. R. Co., 23 Fed. (2d) 822.

IX.

The action of respondents in entering into and carrying out the contract assailed in the bill of complaint whereby one transfer company handles less-than-carload freight for the carriers between off-track and on-track stations and between on-track stations of such carriers in terminal

service, does not violate Sections 1 and 2 of the Sherman Antitrust Act, or either of them.

Skaggs et al. v. Kansas City Terminal Railway Co. et al., 233 Fed. 827;

Donovan v. Pennsylvania Company, 199 & S. 280;

Missouri Pacific R. R. Co. v. Reynolds-Davis Grocery Co., 268 U. S. 366;

Terminal Warehouse Company of Baltimore City v. United States et al., 31 Fed. (2d) 951;

Express Cases, 117 U. S. 1;

St. Louis Drayage Company v. Louisville & Nashville R. R., 65 Fed. 39;

Atchison, T. & S. F. R. R. Co. v. Denver & N. O. R. Co., 110 U. S. 680;

B. & W. Taxi Co. v. B. & Y. Taxi Co., 276 U. S. 518;

Chicago etc. R. R. Co. v. Pullman Car Co., 139 U. S. 79;

Little Rock & M. R. Co. v. St. L. I. M. & S. Ry. Co., 41 Fed. 559;

Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. Co., 51 Fed. 465;

U. S. v. Terminal R. R. Association, 224 U. S. 383;

Terminal Railroad Association v. United States, 236 U. S. 194;

United States v. Joint Traffic Association, 171 U. S. 505;

Phillips v. Iola Portland Cement Co., 125 Fed. 593;

Merchants Warehouse Company v. United States, 44 Fed. (2d) 379, 283 U. S., l. c. 506;

United States v. B. & O. R. R. Co., 231 U. S. 274.

X.

The petitioner is not entitled to have the case transferred to the law side of the court, and the Court of Appeals, in not determining that the evidence shows a case for the law side of the court, committed no error.

Twist et al. v. Prairie Oil & Gas Company, 274 U. S. 684;
Liberty Oil Company v. Condon National Bank et al., 260 U. S. 235;
Perego v. Dodge, 163 U. S. 160;
Palmer v. Doull-Miller Company, 233 Fed. 309;
Shapiro v. Lyle, 30 Fed. (2d) 971;
Keogh v. C. & N. W. Ry. Co., 260 U. S. 156.

ARGUMENT.

I.

Petitioner's Right to Sue.

The Court of Appeals held (R. 177) that the suit brought by petitioner is in respect of a matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission, and that the court below was correct in holding that petitioner had not the right to bring it. At page 9 petitioner says that the Court of Appeals declined to discuss the merits. While it is true the Court said there was no occasion for discussing the question whether the agreement violated the antitrust laws, nevertheless, the decision that petitioner has not the legal capacity to maintain the action is a decision on the merits.

> General Investment Company v. New York Central R. R. Co., 271 U. S. 228.

The Interstate Commerce Act, Section 6 (1) (U. S. C. A., Title 49, Sec. 6), provides, in substance, that every common carrier subject to the provisions of the Interstate Commerce Act shall file with the Commission created by the act and print and keep open to public inspection schedules showing all rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, etc. The tariffs in question were filed in conformity with the provisions of that section.

Off-track stations of the carriers can be made available only through the medium of tariffs filed with the Commission and permitted to become effective by that body. What petitioner is attempting to do is to enjoin the carriers, not from carrying out the contract assailed in the bill of complaint, but from carrying out the provisions of tariffs filed and required to be filed with the Commission.

Petitioner seeks to separate the controversy into two parts: One a matter of contract and the other a matter of tariffs. Without in terms assailing such schedules in its bill, petitioner attempts to enjoin the respondents in respect of the contract. Since the places of business of petitioner are not designated in such tariffs as off-track stations the question naturally arises: If respondents are enjoined from carrying out the provisions of the contract attacked, what becomes of the tariffs on file with the Commission?

When this action was instituted there were on file with the Commission the tariffs of the carriers designating only the places of business of the Columbia Terminals Company as off-track stations of such carriers and canceling previous tariffs designating the places of business of the petitioner as off-track stations. Had the court below entered a decree granting the injunctive relief sought, how would that have availed petitioner? To have granted petitioner any measure of relief, would not the Court necessarily have been required to by its decree not only compel respondents to file tariffs then on file with

the Commission and approved by that body, but also restore the places of business of petitioner as off-track stations through the filing of additional schedules with the Commission?

Petitioner concedes that the services performed by the carriers in furnishing off-track stations and in transferring less-than-carload freight from on-track to off-track stations are matters over which the Interstate Commerce Commission has jurisdiction (R. 172).

In its reply brief in the Court of Appeals the petitioner states:

> "We have always conceded that the Interstate Commerce Commission has jurisdiction of the services performed by these transfer companies, and that the Commission may investigate the service to determine whether the carrier appellees have violated any of the provisions of the Interstate Commerce Act. There is no doubt about this jurisdiction of the Commission, but, as the Commission has correctly held, it has no jurisdiction to control the carriers' discretion in selecting their agents who perform the service."

The Court of Appeals correctly describes petitioner's theory of the case in the following language (R. 172):

> "It is the plaintiff's theory that, while the services to be performed under the contract, the cost of which is necessarily reflected in the rates contained in the tariffs filed with the Commission, are matters subject

to the jurisdiction of the Commission, the agreement itself providing for such services and fixing compensation therefor is not such a matter, and therefore that a suit brought for injunctive relief against the performance of the agreement is not in respect to any matter within the jurisdiction of the Commission. It is asserted that the Court may prevent the carrying out of the contract without affecting the services to be performed or the rates to be charged for such services. To separate the matter of the services required to be performed for the carriers by the Columbia from the agreement by which the railroads have contracted for their performance, and to enjoin the carrying out of the contract without affecting the services or the rates, would seem to require one of those delicate major operations which, while successful from a surgical standpoint, necessarily kills the patient. Under the plaintiff's theory, the Court can enjoin the carriers from establishing off-track stations at the places of business of the Columbia, as provided by the contract, but leave the tariffs designating such stations undisturbed; it may enjoin the carriers from employing the Columbia as their sole transfer agent, and yet leave undisturbed the services which the Columbia is to perform for the carriers at a stipulated cost, as well as the tariff rates which reflect the cost of such services."

The Court of Appeals further finds, and correctly (R. 173):

"Unquestionably, as the plaintiff concedes, the Interstate Commerce Commission had jurisdiction to

investigate, as it did, the reasonableness and lawfulness of what the carriers proposed to do, namely, to reduce the number of off-track stations and to employ a single transfer company to maintain for them such stations and to receive and deliver less-than-carload freight from and to their off-track stations."

In connection with the contention of respondents that the matter here involved is within the supervision and control of the Commission, attention should be called to the various provisions of the Interstate Commerce Act, which, in our opinion, conclusively establish the fact that this controversy, being one of rates and transportation under such rates, is for the Commission. In Interstate Commerce Act, Section 1 (3) (U. S. C. A., Title 49, Sec. 1), transportation is defined to include locomotives, cars, vehicles, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, expressed or implied, for the use thereof, and all services in connection with receipt, delivery and storage and handling of property transported. This includes such services as would be performed for the carriers by the transfer company under the contract assailed in the bill of complaint.

By Interstate Commerce Act, Section 1 (11) (U. S. C. A., Title 49, Sec. 1), it is made the duty of every carrier by railroad subject to the Act to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect thereto.

It is obvious that, in view of the prior definition of "transportation," the term "car service" is broad enough to include the service performed for respondents by the transfer company, and it also follows that the Commission may condemn as unlawful and require to be canceled any tariff provisions which prevent or threaten the performance of the carriers' duties under said paragraphs (3) and (11) of section 1 of the act.

This Court held, in Pennsylvania Co. v. United States, 236 U. S. 351, in considering the jurisdiction of the Commission, that:

> "Not only does the act define railroads, but it specifically defines what is meant by transportation, which is made to include 'cars and other vehicles, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership, or of any contract, expressed or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.' "

The handling of traffic by the carriers between on-track and off-track stations was necessarily a part of the services to be performed under the schedules filed with the Commission, and how that service was to be performed was necessarily an essential part of any investigation that might thereafter be conducted by the Commission.

In the case of Midland Valley R. R. v. Barkley, 276 U. S.

483, the Supreme Court, in discussing the failure to furnish cars for interstate movement of coal during car shortage, held that the question involved was administrative and committed to the exclusive jurisdiction of the Interstate Commerce Commission.

In that case Justice Brandeis said:

> "The assertion that no administrative question is here involved rests upon a misapprehension. It may be assumed that there was no order of the Commission which required the Midland to distribute all available open top cars among the tipple mines, but the reasonableness of the Midland's practice in doing so and in allotting box cars to the wagon mines was the substantial matter in controversy. * * * The reasonableness of the rule adopted by the carrier is a matter for the Commission."

The Interstate Commerce Act, Section 1 (6) (U. S. C. A., Title 49, Sec. 1), directs the carriers to establish rates, regulations, practices and facilities for the handling, transporting, storing and delivery of property, and it is clearly within the jurisdiction of the Commission in its administrative capacity for that body to determine when the carriers have complied with the provisions of such section. The service here involved is a terminal and delivery service and the use of a transfer company to affect such terminal and delivery service is essentially the use of a facility. It is the contention of petitioner that the con-

tract in controversy under which the carriers employ one transfer company to transport less-than-carload freight between the off-track and on-track stations, specified in the schedules on file with the Commission, is an instrument over which the Commission does not have jurisdiction.

The error into which petitioner fell is obvious. Under the Clayton Act it is the subject matter covered by the contract that must be within the jurisdiction of the Commission. If such subject matter is committed by the Interstate Commerce Act to the supervision, administration or other jurisdiction of the Commission, then the presence or nonpresence of a contract as incidental thereto does not affect the regulatory powers of the Commission. Two or more carriers might agree to maintain a certain rate between two given points and file tariffs with the Commission carrying out such agreement, and in such a case unquestionably the lawfulness of that rate would be for the Commission to determine, notwithstanding the fact that such rate was brought about by an agreement which violated the Antitrust Laws of the United States.

The contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it be clear that such construction is erroneous. The Interstate Commerce Commission has had occasion to determine its jurisdiction in connection with the matters involved in this controversy.

It is the contention of respondents that the transfer company is merely an agent and facility of the respondents, transports no freight for its own account in so far as this controversy is concerned, but is only employed by the rail carriers in interstate commerce. This contention is fully borne out by the decision of the Supreme Court in Missouri Pacific R. R. Co. v. Reynolds-Davis Grocery Co., 268 U. S. 366, which holds that those performing only terminal services are merely the agents of the line haul carriers, that their charges are in the nature of switching charges and are absorbed by the line haul carriers.

In the case of In the Matter of Legality of Tariffs Embracing Motor Trucks, etc., 91 I. C. C. 539, the Commission said:

> "In discussing the legality of the tariffs under investigation, the extent of our jurisdiction over the different kinds of service by motor truck or wagon transfer hereinbefore described should first be determined."

After a discussion of the proposition and after reference to certain applicable provisions of the Interstate Commerce Act, the Commission concludes:

> "While motor truck or wagon transfer companies are not common carriers subject to the act, truck or wagon transfer services performed in connection with terminal services of a common carrier subject to the act, or with transfer of freight in transit at an inter-

mediate point by such common carriers, are subject to our jurisdiction. Such service is a part of a transportation service by a carrier over which we have jurisdiction."

The Commission again had occasion to consider the same question in Discontinuance of Inland or Off-Track Stations in New York City, 173 I. C. C. 727, and arrived at the conclusion that the services such as here involved were squarely within its jurisdiction.

The Commission also passed upon the question of its jurisdiction over terminal trucking service performed by railroads in Motor Bus and Motor Truck Operation, 140 I. C. C. Rep., l. c. 729, where it said:

> "We have held that motor carriers are not common carriers subject to the act, but that when services are performed by motor carriers in connection with terminal services of a common carrier subject to the act, or with the transfer of commerce in transit at an intermediate point by such common carrier such motor service is part of the transportion service by a carrier over which we have jurisdiction and such motor-carrier service is under our jurisdiction. Carriers subject to the act may publish tariffs covering charges for such terminal services by motor carriers the same as charges for any other service granted by them as part of their transportation service (Tariffs Embracing Motor-Truck or Wagon Transfer Service, 91 I. C. C. 539)."

To the same effect is the case of Trucking Less-Than-Carload Freight, etc., 185 I. C. C. 71. In that case the Commission, commencing at page 72, says:

> "We have held that motor-truck or wagon-transfer companies are not carriers subject to the act; that line-haul service performed by them is not transportation subject to the act, but that motor-truck or wagon-transfer service performed in connection with terminal services by a rail carrier is subject to our jurisdiction (Tariffs Embracing Motor-Truck or Wagon Transfer Service, 91 I. C. C. 539). When a motor-truck service between freight houses within the same terminal district is performed in interstate commerce by a carrier subject to our jurisdiction, the extent of the service and the rates therefor must be published in tariffs filed with us."

To the same effect is Co-ordination of Motor Transportation, 182 I. C. C. Rep., l. c. 367. Throughout its petition petitioner directs attention to the fact that the Commission has held that motor-truck or wagon-transfer companies are not carriers subject to the Interstate Commerce Act. The cases just cited deal with the question fully and hold that the terminal services performed by such instrumentalities for carriers subject to the act are likewise subject to the Interstate Commerce Act.

Without regard to the contract assailed in petitioner's bill, since the subject matter of this controversy is within the supervision and regulation of the Commission, plaintiff is not entitled to maintain this suit.

A case much in point is that of Keogh v. C. & N. W. Ry. Co., 260 U. S. 156. That case was an action under paragraph 7 of the Antitrust Act of July 2, 1890, brought by Keogh in the Federal District Court for Northern Illinois, Eastern Division. The cause of action set forth was that Keogh was a manufacturer of flax tow, and that the corporations, defendants, were interstate carriers, and that such carriers had formed an association known as the Western Trunk Line Committee; that it was the function of that committee to secure an agreement in respect to freight rates among railroad companies which would otherwise be competing carriers, and that by means of such agreement competition was eliminated. Uniform rates were established and interstate commerce restrained.

The defendants set up the fact that every rate complained of had been duly filed by the several carriers with the Interstate Commerce Commission; that upon such filing the rates had been suspended for investigation upon complaint of Keogh, and that thereafter the rates were approved by the Commission and made effective.

In disposing of the Keogh Case the Court said, in part:

> "The instrument by which Keogh is alleged to have been damaged is rates approved by the Commission. It is, however, conceivable that, but for the action of the Western Trunk Line Committee, one or more of these railroads would have maintained lower rates. Rates somewhat lower might also have been reasonable. Moreover, railroads had often, in the fierce

struggle for business, established unremunerative rates."

Thereafter the Court further states:

"But under the Antitrust Act a combination of carriers to fix reasonable and nondiscriminatory rates may be illegal, and if so, the Government may have redress by criminal proceedings under section 3, by injunction under section 4, and by forfeiture under section 6. That was settled by United States v. Trans-Missouri Freight Association, 166 U. S. 290, and United States v. Joint Traffic Association, 171 U. S. 505. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government. It does not, however, follow that Keogh, a private shipper, may recover damages under section 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed. There are several reasons why he cannot."

The case of Wheeling & L. E. Ry. Co. v. Pittsburgh & West Virginia Ry Co., 33 Fed. (2d) 390, is also an authority for the contention that there is no room for injunctive relief under the Clayton Act, if the matters complained of are subject to the regulation and supervision of the Interstate Commerce Commission.

Certiorari to review this decision was denied by the Supreme Court in P. & W. Ry. Co. v. W. & L. E., 280 U. S. 593.

Petitioner contends at pages 22 and 23 that the Colum-

bia Terminals Company is a necessary party and that that situation deprives respondents of the defense that the subject of the action is within the jurisdiction of the Commission.

The point is overlooked that if the matter in question is subject to the regulation and supervision of the Commission, the authority to bring a suit because of the violation of the Antitrust Laws is with the United States, and the question of who is a necessary defendant is immaterial. The point involved here is not who may be made defendants, but who may be made a plaintiff.

Petitioner cites the case of Moore v. New York Cotton Exchange et al., 270 U. S. 593, as authority in support of its right as a private litigant to maintain this suit against respondents for injunctive relief and refers to the fact that the Western Union Telegraph Company was one of the defendants in that case and that it is a common carrier, subject to the provisions of Chapter 1 of Title 49, U. S. C. A., Transportation, and to the fact that the District Court, the Circuit Court of Appeals, and this Court assumed full jurisdiction of that case and decided all questions presented therein on the assumption that the plaintiff had a right to bring the suit under Section 26, Title 15, U. S. C. A., notwithstanding the proviso contained therein.

Petitioner discusses this case at some length and evidently relies upon it as an authority in its favor to maintain this suit.

Petitioner says that whether jurisdiction was assumed because of the joinder of an indispensable party, the Cotton Exchange, which is not subject to the Interstate Commerce Act, or because the subject matter of the bill was not in respect of any matter over which the Interstate Commerce Commission has jurisdiction, does not appear from the opinion in the case. That case is not even remotely analogous to the case at bar. The Moore case involved a controversy between the Odd-Lot Cotton Exchange and the New York Cotton Exchange and the Western Union Telegraph Company and a subsidiary of the Telegraph Company over the distribution of quotations of cotton prices. The Odd-Lot Cotton Exchange made application to the two telegraph companies for this service which was refused, the New York Cotton Exchange having declined to give its consent upon the ground that the Odd-Lot Exchange was conducting a bucket shop. Plaintiff then sought a mandatory injunction requiring the New York Cotton Exchange to furnish it with continuous quotations. Federal jurisdiction was invoked under the antitrust laws of the United States. This Court said, at pages 603 and 604:

> "First. We are of opinion that upon the allegations of the bill no case is made under the Federal Antitrust Laws. The only possible ground on which the suit can be maintained rests in the claim that there is a violation of Sections 1 and 2 of the Sherman Antitrust Act, c. 647, 26 Stat. 209, for which appellant

is entitled to sue under Section 16 of the Clayton Act, c. 323, 38 Stat. 737. And whether this claim is tenable turns alone upon the effect of the contract between the New York Exchange and the Western Union. Independent of that contract, there is no averment of fact in the bill upon which a violation of the Antitrust Act can be predicated. The New York Exchange is engaged in a local business. Transactions between its members are purely local in their inception and in their execution. They consist of agreements made on the spot for the purchase and sale of cotton for future delivery, with a provision that such cotton must be represented by a warehouse receipt issued by a licensed warehouse in the Port of New York and be deliverable from such warehouse. Such agreements do not provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another. If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce."

Since interstate commerce was not involved, how could the Interstate Commerce Commission have any jurisdiction in the premises? That Commission had no jurisdiction over any of the matters involved in that suit, whereas in the suit at bar the Commission has complete regulatory supervision.

The opinion of the Court of Appeals in the Moore case

emphasizes the fact that interstate commerce was not involved. In 296 Fed. 61 it is said, at pages 70 and 71:

> "(8) The complainant asks a mandatory injunction compelling the defendants to furnish to it the continuous quotations of prices of contracts for the future delivery of cotton made on the New York Cotton Exchange. The transactions in which the latter exchange is engaged and in which the complainant itself is engaged constitute, it is claimed, interstate commerce. The bill alleges that the purchases and sales made on the exchange 'constitute a large and important part of the interstate commerce as between said cotton-growing states and other states, including the State of New York. That in addition to the said interstate sales and purchase as alleged for delivery from said states, through and into many states of the United States, and into the State of New York, the said interstate commerce involves the interstate shipments and transportation of said commodity, through and from said cotton-growing states to the State of New York, whence it is consigned and shipped to other cotton markets of the United States and foreign countries for manufacture.' The contracts made on the New York Cotton Exchange are made in the board room of the exchange in the city of New York, and they provide that the cotton is deliverable from licensed warehouses in the Port of New York. Performance of the contract is made by the delivery of negotiable warehouse receipts issued by licensed warehouses in New York. There is no obligation to make delivery at any place except in the Port of New York. Such a transaction is local in its character and does not involve interstate commerce. The decisions of the

Supreme Court make this clear. In Hopkins v. United States, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, it was held that the Kansas City Live Stock Exchange was not engaged in interstate commerce under the following circumstances: It received consignments of cattle from owners in other states upon an understanding that they should be sold and the net amount realized on the sale returned to the owners. In its opinion the Court said:

> "'* * * It is immaterial over how many states the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the services at that point in selling the cattle for the owner. Thus everything at last centers at the market at Kansas City, and the charges are for services there, and there only, performed.
>
> "'The selling of an article at its destination, which has been sent from another state, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce. Granting that the cattle themselves, because coming from another state, are articles of interstate commerce, yet it does not

> therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade.'

"There are other decisions of that Court which assert a like doctrine. (See Anderson v. United States, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; Ware & Leland v. Mobile County, 209 U. S. 405, 413, 28 Sup. Ct. 526, 52 L. Ed. 855, 14 Ann. Cas. 1031; Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. Ed. 822.)

"The complainant relies upon Board of Trade of the City of Chicago v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470, 67 L. Ed. 839. That case involved an appeal from a decree which dismissed a bill in equity brought by the Board of Trade to enjoin certain United States officials from taking steps to enforce the Act of Congress of September 21, 1922, known as the Grain Futures Act, the constitutionality of which act was directly involved. That case is not distinguishable in principle from that of Stafford v. Wallace, 258 U. S. 495, 42 Sup. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229, which involved the constitutionality of the Packers' and Stockyards' Act of 1921 (Comp. St. Ann. Supp. 1923, Sections 8716¼-8716¼z). In neither case has the Court overruled the cases heretofore cited in this opinion in which sales on the exchange were regarded as transactions in intrastate commerce and not in interstate commerce. It sustained the right of Congress to regulate in the one case the boards of trade and in the other the various stockyards of the country

as great national public utilities. The acts involved assumed that the corporations regulated by the acts conducted a business affected by a public use of a national character and that they were therefore subject to national regulation. These cases show that the power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. We find another illustration of the principle in the Transportation Act of 1920, which authorizes supervision by the Interstate Commerce Commission of intrastate commerce where it is so carried on as to favor persons or localities in intrastate commerce as against those in interstate commerce. (See Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 42 Sup. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086; The Minnesota Rate Cases, 230 U. S. 352, 399, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. [n. s.] 1151, Ann. Cas. 1916 A 18.)

"But we find nothing in Stafford v. Wallace, supra, or in Chicago Board of Trade v. Olsen, or in any decision of the Supreme Court, which supports the complainant's contention that the New York Cotton Exchange is engaged in interstate commerce. Neither are we cited to any act of Congress which entitles the complainant to maintain its bill. And we conclude that the bill itself must be dismissed."

The case of General Investment Co. v. New York Cent. R. Co., 23 Fed. (2nd) 822, holds that:

"Whenever any subject matter pertaining to inter-

state commerce is vested in the Interstate Commerce Commission the proviso of Section 16 applies to it."

Certiorari was denied in this case by the Supreme Court (277 U. S. 588).

II.

Illegal Combination.

It was the conclusion of the Court of Appeals that the suit brought by petitioner is in respect of a matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission, and that the court below was correct in holding that petitioner had not the right to bring it.

In view of that conclusion the Court of Appeals found no occasion for discussing the question as to whether the agreement between the carriers and the Columbia is violative of the antitrust laws, since that question could properly be considered only in a suit in which injunctive relief was sought by the United States.

The petitioner asserts that in so holding the Court erred, that petitioner had a lawful right to bring the suit, and that the Court should have held that the Anti-Trust Act was violated.

Petitioner in its bill (R. 8) alleges, among other things:

"That on or about March 31, 1931, with the deliberate purpose and intent of consummating and carrying

into binding effect the aforesaid unlawful conspiracy and agreement to destroy the business of your orator and to unlawfully restrain petitioner in said business the railroads entered into a mutual and reciprocal agreement among themselves, designating and appointing the Terminal Railroad Association of St. Louis as their common agent," etc.

To refute the assertion that the purpose of the one-transfer plan is to destroy the business of petitioner and others similarly situated it is only necessary to refer to the testimony and the contract entered into between the rail carriers and the Columbia Terminal Company. The testimony unquestionably shows the purpose and only purpose of the one-transfer plan (R. 73). Some of that testimony is as follows:

"One purpose of the carriers in arriving at the one-transfer plan is to determine for themselves where the off-track station should be located, and who should operate it. That is evidenced by the fact that, in designating the seven off-track stations in St. Louis, to and from which the St. Louis rates of the carriers apply, as outlined in the tariff to be effective November 1, 1931, the carriers not only eliminated certain stations of the Central Transfer Company, but they also failed to recognize two of the existing stations of the Columbia Terminals Company. Under the present method, and before the filing of these tariffs, the greatest abuse came about from the fact of locating what might be called competitive stations—that is hardly a proper designation—duplicate stations in the

same general locality, which, of course, if all the transfer companies engaged as agents of the carriers were supported, would necessitate unnecessary support of, and investment in, facilities and equipment. Another abuse was the practice of the transfer companies employing soliciting forces to vie with each other to see which one of them would do the hauling for the carriers. The expense of that was applied in the cost of operations and ultimately borne by the carriers who employed the transfer companies as their agents. There were some cases where off-track stations were located across the street from on-track stations, where the haul would only be across the street from the off-track to the on-track station. The elimination of those duplications would have the effect of bringing about the savings that are reflected to some extent in the terms of this contract."

An example of the situation sought to be corrected by the one-transfer plan is found in the first report of the Commission following its investigation of conditions respecting the receipt and delivery and interchange of less-than-carload freight at St. Louis and East St. Louis, as follows (R. 92):

"The Missouri Pacific and Frisco have on-track stations located on the south side as well as the north side of St. Louis. Notwithstanding that fact they have for years paid allowances for the hauling of freight between off-track stations in St. Louis. An extreme illustration of this wasteful expenditure is afforded in the case of the off-track station of the Columbia at

Seventh and Cerre streets. This is an outbound station, purchased from the Fidelity Transfer Company, and located directly across the street from the Frisco outbound depot. So long as the allowance remains in effect it is possible for a shipper to dump outbound freight for movement over the Frisco at this off-track station, and for the handling of it across the street, very often accomplished by a truck-to-truck transfer without passage over the off-track station platform, the Frisco has been and is paying an allowance of $2 per net ton. The situation is only slightly less flagrant in respect of the Missouri Pacific on-track station, which is only 210 feet away from this outbound depot. It was situations such as these that finally brought the east-side and west-side lines, strongly competitive, to a realization that corrective measures must be applied to prevent gross waste of revenue. Under the proposed tariffs the Missouri Pacific and Frisco, with the exception hereinafter noted, will discontinue use of off-track stations both on the south side and north side of St. Louis, and will use their on-track facilities for the receipt and delivery of less-than-carload freight."

It is well at this point to refer to the contract assailed in the bill of complaint (R. 50). An analysis of this contract shows:

1. The railroads have selected off-track stations indicated in such contract.

2. The Columbia Terminal Company agrees to provide and maintain, at its sole cost and expense, to the satis-

faction of the railroads, adequate station facilities termed "off-track" freight stations for handling less-than-carload freight, and which shall be located in accordance with the selection by the rail carriers.

3. The rail carriers agree to designate the freight stations specified in sections Nos. 1 and 2 of this agreement as the only off-track freight stations of railroads in the City of St. Louis and City of East St. Louis, which off-track stations are, of course, the station facilities agreed to be maintained at its sole cost and expense by the Columbia Terminals Company.

4. The rail carriers agree to file necessary tariffs with the proper regulatory bodies designating the off-track stations in question.

5. The agreement also covers the transfer of less-than-carload freight in interchange between on-track stations of the carriers.

6. The amount to be paid to the Transfer Company is stated for its service in transporting less-than-carload freight between off-track and on-track stations and between on-track stations.

It will be observed that what the carriers seek to accomplish by the contract assailed in the bill of complaint and what they have accomplished by such contract is a substantial saving in costs of handling less-than-carload freight at St. Louis and East St. Louis, a proper location of off-track stations, and a more efficient handling of

the traffic involved through the selection by such rail carriers of one transfer company to do the work, and the carriers are as much within their lawful rights in establishing such off-track stations as such carriers would be in locating on-track stations on their rails or in the establishment and operation of a union station.

It will also be observed that the essence of the contract assailed is that the rail carriers shall designate certain off-track stations as freight stations of the railroads, shall deliver to one transfer company less-than-carload traffic handled in interchange, and that the arrangement shall continue for a period of one year, with the privilege thereafter of termination by either party upon six months' notice.

The case of Merchants Warehouse Company v. United States, 44 Fed. (2d) 379, declares the rule well settled that a railroad carrier may exercise its own discretion in the selection of its agents and employes to perform any part of its transportation service.

Inasmuch as the rail carriers maintain off-track stations at St. Louis and East St. Louis, such off-track stations are carrier facilities to the same extent as are the on-track stations of such carriers.

As stated by the Supreme Court in Merchants Warehouse Company v. United States, 283 U. S., l. c. 506:

> "We may assume that the railroads, in order to carry on their business as interstate carriers, are not

> bound to maintain their own freight stations, but may contract with others to supply them and to perform the transportation services which they are under a duty to perform."

If the carriers have such right, it is evident that such carriers may agree as to the number of stations maintained and who shall be their agent in connection therewith.

There is nothing in the arrangement covered by the contract, which petitioner alleges violates the Sherman Anti-trust Act, that might be called a combination not to employ the plaintiff or other transfer companies. As stated, the agreement, in substance, provides for the selection of certain off-track stations as the only off-track stations of the carriers, and also provides for only one agent to handle the traffic in connection with such off-track stations and selects one transfer company for the handling of its interchange business. There does not exist any agreement, however, to destroy the business of petitioner.

Having regard to the fact that the contract assailed in the bill of complaint provides for the selection of one transfer company to perform certain terminal services for the carriers party to such agreement the case of Terminal Warehouse Company of Baltimore City v. United States et al., 31 Fed. (2d) 951, is peculiarly in point. In that case, at page 956, the Court says:

> "It is also well settled that a carrier has full liberty to select its own agents to perform transporta-

tion service on its behalf, which it is under legal obligations to perform, and that it may employ one agent exclusively, and refuse to employ another (Covington Stockyards v. Keith, 139 U. S. 128, 11 S. Ct. 461, 35 L. Ed. 73; Express Cases, 117 U. S. 1, 6 S. Ct. 542, 628, 29 L. Ed. 791; Chicago etc. R. R. v. Pullman Southern Car Co., 139 U. S. 79, 11 S. Ct. 490, 35 L. Ed. 97; Donovan v. Pennsylvania Co., 199 U. S. 279, 26 S. Ct. 91, 50 L. Ed. 192)."

The case of Skaggs et al. v. Kansas City Terminal Railway Co. et al., 233 Fed. 827, is in point. The facts in that case are:

The carriers by railroad entering Kansas City formed the Kansas City Terminal Railway Company for the purpose of having such last-named company act as their joint agent and, among other things, in operating a union depot at that point. While operating such union depot for the trunk-line carriers serving Kansas City, Missouri, it entered into a contract with a certain transfer company, giving to such transfer company the exclusive privilege of soliciting patronage for its cabs, carriages and baggage service upon the grounds and premises of the Terminal Company at the Union Station operated by it. Such contract was attacked as unlawful as a conspiracy and agreement in restraint of trade and as creating a monopoly affecting interstate and intrastate commerce.

The particular point to which we call the attention of the Court in this case is that the Terminal Association at

Kansas City was owned by, was a creature of, was the agent of and operated for, the benefit of its owners, a facility at Kansas City, Missouri, and that any contract made by it giving exclusive privilege to one transfer company to enter upon its grounds to solicit patronage for cabs, carriages and baggage was in connection with transportation performed by the owners of the Terminal, the trunk lines entering Kansas City, and the effect of any such contract would be to give to one transfer company the exclusive right to solicit business on the grounds of the Terminal Company that came from the lines of the owning trunk-line companies.

In other words, looking to the substance rather than to the form of the contract in the Skaggs case, a situation was brought about wherein one transfer company had the exclusive right to enter upon the grounds of the Terminal Company and solicit patronage for its cabs and carriages arising from the operation of all the trunk lines entering such grounds.

The Terminal Company had no passengers and no baggage to be carried, but simply provided a facility used by the trunk lines, and the effect of the contract was in law an exclusive privilege granted by the trunk lines, through their agent, the Terminal, to one transfer company to enter upon the grounds of the Terminal and solicit business as aforesaid.

In these proceedings the contract between the transfer company involved and the trunk-line carriers was made

directly through the president of the Terminal Railroad Association of St. Louis. That is to say, the contract here assailed between the Columbia Terminals and the trunk-line carriers was entered into between the transfer company on the one hand, and the president of the Terminal Railroad Association on the other, acting for and on behalf of trunk lines.

In law there is no difference between the arrangement proposed at St. Louis and the arrangement upheld by the Court of Kansas City. In upholding the contract in the Skaggs case the Court said:

> "Furthermore, the rights of the public are not impaired by the grant by a railroad company of the exclusive privilege to solicit patronage for hacks and baggage transferring within its depot grounds, where the recipient of the privilege and the facilities furnished are subject to legislative regulation."

Another case in point is that of Donovan v. Pennsylvania Company, 199 U. S. 280. The facts in that case are as follows:

The Pennsylvania Company operated what was known as the Union Passenger Station in Chicago and had as its tenants the Chicago and Alton Railway Company, the Chicago, Burlington and Quincy Railway Company, the Chicago, Milwaukee and St. Paul Railway Company and the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. All of such last-named companies occupied and

used the station under a lease by which the Pennsylvania Company had charge of the station, with authority to control and manage all trains therein, as well as all watchmen and employes in the business there transacted. The Pennsylvania Company instituted against the defendant Donovan and others, for the purpose of protecting that company in the enjoyment of certain alleged rights and privileges in respect of its passenger station and depot grounds in Chicago, and asked that defendants be perpetually enjoined from entering the station of the plaintiff for the purpose of soliciting the custom of incoming passengers for cabs, carriages, express wagons, hotels, etc.

Under the pleadings two principal inquiries arose: First, whether the Pennsylvania Company, having made an arrangement with the Parmalee Transfer Company to furnish at its passenger station all vehicles necessary for the accommodation of passengers arriving there on its trains and on the trains of other railroad companies, might legally exclude from its depot grounds all hackmen or expressmen coming to either for the purpose only of soliciting for themselves the custom or patronage of passengers; and, second, the rights of the Pennsylvania in connection with the use of the sidewalk in front of the station.

It will be observed, dealing with the first inquiry stated, that the traffic in question not only arose from the operation of Pennsylvania trains, but from trains of other railroad companies using the station.

Citing many cases not necessary to refer to here, the Court upheld the right of the Pennsylvania Company to confer upon one transfer company the exclusive use of its grounds to solicit patronage, not only in connection with Pennsylvania trains, but in connection with the trains of other railroads using the station facilities of the Pennsylvania.

An examination of the provisions of Sections 1 and 2 of the Sherman Antitrust Act shows that the principles declared by the courts in the Skaggs and Donovan cases, supra, are applicable to the arrangement of defendants and assailed in the bill of complaint. The essence of the illegality declared in said sections is restraint of trade and commerce. If there is no restraint of trade the contract or combination is not unlawful. The question, therefore, to be determined in any case is not how many are parties to a given contract or combination, but whether the effect of such contract or combination is to unreasonably restrain trade and commerce.

In the Skaggs case, supra, the parties actually making the arrangement were only the Kansas City Terminal Railway Company and the transfer company, the traffic affected by such arrangement was that handled by all the trunk-line railroads entering the Union Station maintained by the Terminal Railroad Company and the effect of such arrangement on trade and commerce necessarily was the same whether the contract was entered into between the Terminal and the transfer company or between the trans-

fer company and all of the trunk lines entering the Union Station, and the Court, in holding that there was no unlawful restraint of trade or commerce, sanctioned an agreement whereby the business of all the trunk lines entering the Union Station, in so far as such business was affected by the contract, for solicitation purposes was placed in the hands of one transfer company.

In the Donovan case, supra, while the arrangement in controversy was entered into only between the Pennsylvania, on the one hand, and the Parmelee Company, on the other, yet, since the Pennsylvania station was used by several other trunk lines entering Chicago, the effect of the arrangement was to give to the Parmalee Company the right to enter the station operated by the Pennsylvania and solicit the business, not only of the Pennsylvania, but of all the trunk lines using such station. The arrangement, therefore, brought about a situation whereby the Parmelee Company was given the exclusive right to enter the grounds of the Pennsylvania Company and solicit the business of all trunk lines entering the station to the exclusion of other transfer companies.

The similarity of the arrangement in the Donovan case, in so far as interstate traffic was concerned, with the arrangement assailed in this proceeding is obvious, and if in the case cited no unlawful restraint of trade or commerce resulted, certainly none would result here. The point we make is that the question of whether or not trade and commerce are restrained must be determined by the ar-

rangement in question rather than by whom the contract was entered into or by the number of carriers parties to such arrangement.

Other cases in which the courts have expressed views similar to those contained in the Donovan and Skaggs cases, supra, are cited under point IX, summary of the argument.

Petitioner seems to rely on United States v. Terminal Railroad Association, 224 U. S. 383, in which the United States filed a bill to enforce the provisions of the Sherman Act against the Terminal Railroad Association and thirty-seven other corporate and individual defendants as a combination in restraint of interstate commerce. The contention is made that these transfer companies, including the petitioner, performed by dray or truck service similar to that performed by the Terminal Railroad Association and involved in the case cited.

The error of petitioner is apparent and an analysis of the Terminal case shows that the conclusions therein arrived at are against the contentions of petitioner and support the arrangement assailed. The controlling findings of fact made by the Supreme Court in the Terminal Case, supra, are:

1. The Terminal Railroad Association was organized for the express purpose of acquiring the properties of several independent companies at St. Louis with a view to combining and operating them as a unitary system.

2. The properties first acquired and combined into one system by the Terminal Company comprised the Union Railway & Transit Company of St. Louis and East St. Louis, the Terminal Railroad of St. Louis and East St. Louis, the Union Depot Company of St. Louis, The St. Louis Bridge Company and the Tunnel Railroad of St. Louis. These properties included the great Union Station, the only existing railroad bridge—the Eads Bridge—and every connecting or terminal company by means of which that bridge could be used by railroads terminating on either side of the Mississippi River.

3. The promoters of the Terminal Company sought to obtain the control of every feasible means of railroad access to St. Louis, or means of connecting the lines of railway entering on opposite sides of the river, which was manifested by the successive steps which followed.

4. The first successive step was the control by the Terminal of the Merchants' Bridge Company and its related terminal companies.

5. The next step was the acquisition of the Wiggins Ferry Company, which owned terminals on both sides of the Mississippi River, and through such terminals connected with the rail lines at St. Louis and at East St. Louis.

The Court then states:

"We come, then, to the question upon which the

case must turn: Has the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the Antitrust Act?"

The Court then finds that the unification of terminal facilities of a great city where many railroad systems center is not, under all circumstances and conditions, a combination in restraint of trade, and holds also that whether it is a facility in aid of interstate commerce or an unreasonable restraint forbidden by the Act of Congress, as construed and applied in the case of The Standard Oil Company v. The United States, 221 U. S. 1, depends upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about, and the manner in which the control has been exerted, stating that:

> "The consequence to interstate commerce of this combination cannot be appreciated without a consideration of natural conditions greatly affecting the railroad situation at St. Louis."

The Court finds that though twenty-four lines of railway converge at St. Louis, none of them passes through; that about one-half of these lines have their termini on the Illinois side of the river, and that the others coming in

from the west and north have their termini either in St. Louis or on its northern edge.

It further finds that the cost of construction and maintenance of railroad bridges over the Mississippi River is so great as to make it impracticable for every road desiring to enter the city to have its own bridge, and that the obvious solution is the maintenance of toll bridges open to the use of any and all lines upon identical terms. That the first bridge—the Eads Bridge—was and is a toll bridge available to any carrier on equal terms; but to use it, there must be access over rails connecting the bridge and the railway, and this condition resulted in the organization of independent companies, which undertook to connect the bridge on each side with various railroad termini. Thus, while the bridge might be used by all upon equal terms, it was accessible only by the means of the several terminal companies operating lines connecting it with the railroad termini.

This brought about a condition which led to the construction of the second bridge—the Merchants' Bridge—also a toll bridge and subject to use by all on equal terms. This Merchants' Bridge, like the Eads Bridge, had no rail connections with any of the existing railroads, and these facilities, as in the case of the Eads Bridge, were supplied by a number of independent railway companies who undertook to fill in the gap between the bridge ends and the termini of railroads on both sides of the river.

Then the Court finds that these lines, connecting rail-

roads with the railroad bridges, dominated the situation and stood, as it were, just outside the gateway, and none could enter, even though the gate stood open, who did not comply with their terms.

The result was that, as a practical matter, it was impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the Terminal Company. This was true not only because of the facts before stated, but because of the geographical and topographical situation in and around St. Louis.

The trunk-line railroad companies, being the sole stockholders of the Terminal Company, compelled all other railroad companies converging at St. Louis to use the facilities owned and operated by the Terminal Company, and while previously there had existed the Wiggins Ferry Company and the Merchants' Bridge Company, as well as the Terminal Company, the result of the combination was to substitute the facilities of only one, and that the Terminal.

The Court then says:

> "The physical conditions which compel the use of the combined system by every road which desires to cross the river, either to serve the commerce of the city or to connect with lines separated by the river, is the factor which gives greatest color to the unlawfulness of the combination as now controlled and operated."

It became, therefore, important in the minds of the Court to know the character and purpose of the corporation which had combined all of the terminal instrumentalities upon which the commerce of a great city and gateway between East and West must depend.

The Court then finds:

1. That the Terminal Company was organized in 1889, at the instance of six railroad companies, for the purpose of acquiring all existing terminal instrumentalities for the benefit of the combination, and such other companies as they might thereafter admit to joint ownership by unanimous consent.

2. That by another clause in the agreement the proprietary companies obligated themselves to forever use the facilities for all business destined to cross the river which would seem to guarantee against any competitive system, since the companies to the agreement then controlled about one-third of the railroad mileage of the United States.

3. That certain practices of the Terminal Company operated to the disadvantage of the commerce which must cross the river at St. Louis and of nonproprietary railroad lines compelled to use its facilities, one of which grew out of the fact that the Terminal Company was a terminal company, and something more; that it did not confine itself to supplying and operating mere facilities for the inter-

change of traffic between railroads and in assisting in the collection and distribution of traffic for the carrier companies.

4. That the Terminal, as well as several of the absorbed companies, were organized under ordinary railroad charters.

5. That the Terminal Company filed its rate sheets for the transportation of every class of merchandise from the termini of the railroad on the Illinois side of the river to destinations across the river over its lines.

6. That the Terminal Company adopted another practice that marked it as a transportation company which had interposed itself between railroads having their termini on both sides of the river, and between the city itself and the roads terminating on the east side of the river, which was that all traffic destined to cross the river at St. Louis, whether bound east or west, or destined for the city if coming from the east, was billed only to East St. Louis and there rebilled to destination.

7. That the effect of this practice of rebilling at East St. Louis and of imposing this arbitrary upon traffic originating within 100 miles of the city, destined to cross the river, applied to the large coal traffic from the Illinois coal mines, upon which the City of St. Louis is largely dependent.

Then the Court states:

> "But the illegal restraint upon commerce among the states which we here find to exist consists in the possession acquired by the proprietary companies, through the means and with the object we have stated, of dominating commerce among the states carried on by other railroads entering or seeking to enter the City of St. Louis, and by which such railroads are compelled either to desist from carrying on interstate commerce or to do so upon the terms imposed by the proprietary companies. This control and possession constitutes such a grip upon the commerce of St. Louis, and commerce which must cross the river there, whether coming from the east or west, as to be both an illegal restraint and an attempt to monopolize."

The foregoing analysis of some of the holdings in the Terminal case indicates clearly that the Court was of the opinion the combination assailed in that case was an unreasonable restraint of interstate commerce because, and only because of, the Terminal control of the entire gateway through St. Louis through the medium of tracks connecting with the bridges across the Mississippi River at that point, and because the Terminal had taken unto itself the functions of a railroad company rather than a terminal company. And added to these was the fact found by the Court that the topographical situation at St. Louis was such as to preclude the construction and maintenance of other tracks and bridges across the river to compete with the Terminal. These things gave the

Terminal a complete monopoly as a carrier by railroad of all the railroad traffic entering or passing through the St. Louis gateway.

There are no facts in the instant proceeding in anywise similar to those found by the Court to exists in the Terminal case. The Court, however, in that case made other findings which apply with peculiar force to the facts of this proceeding. For example:

1. The mere combining of several independent terminal systems into one may not operate as a restraint upon the interstate commerce which must use them.

2. The combination condemned would not have been an illegal restraint had it been what was claimed for it; a proper terminal association, acting as the impartial agent of every line which was under compulsion to use its instrumentalities.

3. That there is an essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business and are of the greatest public utility. They, under proper conditions, do not restrain, but promote, commerce.

In light of the fact that the contract assailed in this proceeding has to do with the receipt and delivery of

freight and in the interchange thereof, the views of the Court in the Terminal case just before set out are peculiarly appropriate and clearly distinguish what is involved in these proceedings from what was held to be an unreasonable restraint of trade and commerce in the Terminal case.

The Columbia Terminals Company is not only a mere terminal facility, but under the arrangement attacked is the impartial agent of the carriers to transfer carrier freight between off-track and on-track stations maintained by such carriers and in interchange. Such transfer company's only function is the collection and distribution of less-than-carload traffic within the St. Louis-East St. Louis terminals and the handling of that character of traffic between the on-track stations of the rail carriers. In no regard can it be said that such function in any sense restrains or impedes the movement of trade and commerce through the St. Louis gateway, and with less reason can it be said that because the appellant is not a coagent with the Columbia Terminals in collecting and distributing such traffic the Sherman Antitrust Act is violated.

The Interstate Commerce Commission, in its first report (R. 99), distinguished the combination condemned in the Terminal Company case, supra, from the facts here involved in the following language:

> "Counsel for the St. Louis Chamber of Commerce takes the position that the proposed contracts with the

Columbia will create a monopoly, in contravention of the Sherman Antitrust Act, 26 Stat. 209, c. 647. He relies upon United States v. St. Louis Terminal, 224 U. S. 383, in which the Supreme Court condemned the arrangements entered into between proprietary lines on the one hand and the Terminal on the other hand. He argues that these transfer companies are here performing by dray or truck precisely the same service that the Terminal performs by rail. Admitting these contentions, the case referred to is authority for the conclusion that the arrangement here proposed will not result in an unlawful restraint of interstate commerce. The commerce there found unlawfully restrained was in the entire traffic from, to and through St. Louis, rather than in the receipt or delivery of traffic at that point. The Court stated that if the Terminal Association were to be treated as a mere terminal facility the unification might be deemed promotive of the public interest. It was the grip which the association had upon the ingress and egress of commerce from beyond the terminal area over new and additional lines which made it unlawful. At page 410 the Court said:

"'Plainly, the combination which has occurred would not be an illegal restraint * * * if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities.'

"The Columbia is such an agent. Its services are those of a mere terminal facility. The arrangements proposed will not change in any manner the flow of commerce to, from or through St. Louis, either by the lines now serving it or by others which might later be

built, but will merely provide a different means of handling the receipt and delivery of existing traffic.

"There is nothing in the so-called one-transfer plan in and of itself which is unlawful. Nor can we conclude upon this record that service under this plan will be inadequate. Experience, alone, will answer that question, and if at any time the service becomes inadequate or is surrounded by practices which are unlawful, the shippers have recourse to us through the unusual channels of complaint."

That the views of the Commission are correct is evident from what the Supreme Court found in its second decision in the Terminal case (Terminal Railroad Association v. United States, 236 U. S. 194), in which the Court approved the decree entered in the District Court pursuant to the findings and mandate of the Supreme Court in its first decision (United States v. Terminal Railroad Association, 224 U. S. 383); but the decree as entered in the District Court was required to be modified

"so as to recognize the right of the Terminal Company, as an accessory to its strictly terminal business, to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same."

The substance of the decree, as modified, pursuant to the second decision, is quoted by the Supreme Court in its third decision (Terminal Railroad Association v. United

States, 266 U. S. 17), and, in so far as here material, is as follows:

"1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Antitrust Act of July 2, 1890 (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business, such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storing and the like, and modifying its contracts as herein specified. An election having been made to continue the combination for terminal purposes, the defendants are therefore perpetually enjoined from in anywise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered. Provided, however, that the right of said Terminal Railroad Association as an accessory to its strictly terminal business to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same, is

hereby recognized, and nothing in this decree shall be construed to deny such rights."

It will be observed from the foregoing that the vice inherent in the operation of the Terminal in the first instance was that it operated as a railroad transportation company, and that in the decree, as modified, it elected to confine itself to the transaction of a terminal business, such as supplying and operating facilities for the interchange of traffic between railroads and assisting in the collecting and distributing of traffic for the rail carriers. As such, the decree was approved and as a terminal facility the Terminal was not held not to be a combination in restraint of trade.

The services here involved consist, as stated, only in the collection and distribution of less-than-carload freight and supplying facilities for interchange of less-than-carload traffic within the St. Louis-East St. Louis district. Such service as is proposed to be rendered is not in violation of the Antitrust Laws under the decisions of the Supreme Court in the Terminal case.

The fact should be emphasized that, while petitioner insists that it is engaged in interstate commerce, it transports no freight for its own account. The rail carriers transport the commerce involved, and the petitioner is only employed by the rail carriers in such commerce. It is not asserted that the petitioner is entirely without the provisions of the Sherman Antitrust Act, but it is in-

sisted that it is not engaged in the transportation of interstate commerce under the Interstate Commerce Act, as is the Terminal Railroad Association, and that, since the commerce involved is transported by the rail carriers, petitioner is only a facility used by such railroads in transporting such commerce, the same as such carriers would use their own rails, box cars and engines.

In the Terminal case, supra, the Terminal was a railroad transportation company, filing tariffs with the Commission and engaging in the transportation of interstate commerce on its own account. Obviously, by reason of the fact that it controlled the bridges, in fact, the entire gateway—that is, the railroad gateway at St. Louis—and through such control the commerce of the country passing through such gateway, it is apparent that while the arrangement was condemned by the Supreme Court, no such situation exists, in so far as this controversy is concerned, and it requires a peculiar stretch of the imagination to contend that since the railroads use only the facilities of the Columbia Terminal Company, commerce is restrained, in view of the fact that the commerce in question is at all times railroad freight in possession of the railroads and being transported by the railroads through facilities either owned or contracted for by them.

Since the Columbia Terminal Company acts only as the agent of the carriers, or rather as a facility of the carriers, in terminal service handling less-than-carload freight being transported by such carriers and not on its own account,

by no process of reasoning can the situation created be likened to that passed upon by the Supreme Court in its decisions in the Terminal case.

It should not be overlooked that, as now construed, the Sherman Antitrust Act applies only to combinations in unreasonable restraint of trade (Standard Oil Company v. United States, 221 U. S. 1), and, in so far as this controversy is concerned, the only fact held up as constituting unreasonable restraint of trade is the fact that the carriers by rail do not employ the petitioner. It is not asserted that if petitioner were employed that any change would be brought about in the manner in which such traffic is being handled.

The case of United States v. Joint Traffic Association, 171 U. S. 505, holds with reference to contracts that the Antitrust Law applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that when the effect upon interstate commerce is indirect or incidental only, the Antitrust Statute does not apply.

That case also holds that an agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not covered by the antitrust laws, although the agreement may indirectly and remotely affect that commerce.

To the same effect is the holding of the Court in Phillips v. Iola Portland Cement Company, 125 Fed. 593.

The Duplex Printing Press case, Coronado Coal case, Bedford Stone case and other similar cases, cited and relied upon by petitioner in support of the proposition that the arrangement here assailed constitute a violation of the Sherman Act and an unlawful monopoly, have no analogy to the instant case, are clearly distinguishable and are not in any sense controlling. The authorities heretofore cited clearly establish the fact that the arrangement assailed violates none of the provisions of the anti-trust laws of the United States.

III.

Other Rulings of the Court of Appeals.

Petitioner, commencing at page 33, contends that certain holdings of the Court of Appeals were erroneous; for example, the conclusion of the Court that the execution of the contract was "the adoption by the carriers jointly of a method or practice of handling" this freight is criticized. It is contended that what the carriers adopted jointly was not a practice, but an illegal oral agreement to discharge petitioner. An examination of the contract discloses that the Court was correct. As stated by the Court, all that the carriers have done is to arrange jointly for the performance of a terminal service which does not differ substantially from that performed by the Terminal

Association with respect to carload freight. The point is made that page 35, Exhibit 10, is not a joint contract, but simply a device whereby one transfer company is employed by sixteen carriers under sixteen different contracts made by a combination, that the service of the Columbia is personal and confidential, each carrier paying its own bills with no obligation to or for its associates and having no interest in the service performed for them.

The contract in question provides for a sole transfer company to perform for each carrier certain terminal services, and the fact that there is no obligation on the part of one carrier to pay the Columbia for services performed for another carrier party to such an agreement is wholly beside the point. The further point is made at page 36 that the Court erred in stating (R. 170) that the investigation of the Commission was "to determine the lawfulness of the methods proposed by the carriers for reducing the number of off-track stations." Then the further point is made that the Court erred in saying that "the Commission reached the conclusion * * * that the proposals to reduce the number of off-track stations * * * would not be harmful to the public interest." Petitioner has overlooked the conclusion of the Commission (R. 120) as follows:

> "We have seen that there is nothing violative of the law in the proposal of the carriers to restrict the hauling for and on their behalf to a single transfer agency. * * * Likewise, this record is not convinc-

ing that unreasonable or inadequate service will result from, or that public interest will be adversely or unreasonably affected by the proposed limitation in the number of off-track stations to be operated for the respondents, particularly if the suggestions herein made in respect of direct delivery service are carried out."

IV.

Disposition of the Case.

Under the above heading petitioner says if the Court holds that it has the right to bring this suit it presumes this Court will then pass upon the merits of the case, but if it be held that petitioner has not the right to sue in equity, then petitioner requests that the decrees below be reversed, the pleadings ordered amended, and the case be transferred to the law side of the District Court under Equity Rule 22 and Section 397, Title 28, U. S. C. A. The cases of White v. Sparkill Realty Corporation, 280 U. S. 500, and Diamond Alkali Company v. Tomson & Co., 35 Fed. (2d) 117, are cited in support of the latter suggestion. Neither of said cases, however, is controlling here. The request that the case be transferred to the law side comes rather late and should not be considered by this Court in passing upon the petition for certiorari. Petitioner filed its bill in equity and sought only injunctive relief under Section 26, Title 15, U. S. C. A. (R. 168). The cause was tried before the District Court as

an equity suit and there was no suggestion or request by petitioner at any time while the case was pending in that court that it should be transferred to the law side. This is not the case of where what is really an action at law is erroneously begun as a suit in equity. This is unmistakably a suit in equity. Petitioner attempted to state a cause of action cognizable only in a court of equity, as shown by the allegations of the bill and by its prayer for relief. It was only interested in securing injunctive relief to prevent respondents from putting into effect the arrangement to reduce the number of their off-track stations in St. Louis. As petitioner prayed for a temporary restraining order, a preliminary injunction, and a perpetual injunction (R. 10) it doubtless would have strenuously resisted transfer of the cause to the law side by the District Court. Plaintiff prosecuted its appeal as from a decree in an equity cause and did not at any time suggest to the Court of Appeals that the case should be transferred to the law side in the event it was held that it could not maintain a suit in equity for injunctive relief. The proceedings on the appeal and in the Court of Appeals were throughout those customary in an equity cause. From petitioner's conduct of the appeal the Court of Appeals could have had no idea that petitioner desired the case transferred to the law side, and petitioner did not see fit to direct that Court's attention to the matter by a petition for rehearing.

As said by this Court in Twist et al. v. Prairie Oil & Gas Company, 274 U. S. 684:

> "In federal courts, as in others, a plaintiff has a right to choose whether he will seek to enforce a legal or an equitable cause of action and whether he will seek legal or equitable relief. He makes his election and proceeds at law or in equity at his peril."

In the case just cited this Court reversed the Circuit Court of Appeals for this (8th) circuit for treating the appeal as one at law and affirming the judgment on the pleadings, and remanded the case to it with instructions to decide the appeal as one in equity.

In Liberty Oil Company v. Condon National Bank et al., 260 U. S. 235, this Court also reversed the Circuit Court of Appeals for this (Eighth) circuit for treating the appeal in that case as one in an action at law and reversed and remanded the case to that court for consideration and decision of the issues of fact and law as on an appeal in equity. In view of these two cases, the Court of Appeals, in the instant case, was fully justified in deciding the appeal as one in equity.

In Perego v. Dodge, 163 U. S. 160, it was held that plaintiff, having voluntarily invoked the equity jurisdiction of the court, he was in no position to urge, on appeal, that his complaint should have been dismissed on account of adequacy of remedy at law. This case is cited in Twist et

al. v. Prairie Oil & Gas Company, supra. Plaintiff in the case at bar is in the same position. Petitioner should not be allowed to blow hot and cold with the Court.

The request for transfer of the case to the law side is a mere afterthought. Moreover, transfer of the case to the law side would be a useless gesture, as petitioner, under the decision of this Court, in Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, cannot maintain an action in damages against respondents for alleged violation of the Antitrust Laws any more than it can maintain this action for injunctive relief.

Where the question whether a suit should be on the law or equity side of the court is not important for the purpose of the decision because the same result must be reached in either event, the cause will not be transferred from the side on which it is brought to the other side of the Court (Palmer v. Doull Miller Co., 233 Federal 309; Shapiro v. Lyle, 30 Federal [2d] 971).

Conclusion.

It is therefore respectfully submitted that the conclusion of the Court of Appeals to the effect that the suit brought by petitioner against these carriers, respondents, is in respect of a matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission, and that petitioner had not the right to bring it, is correct; that the holding of the District Court to the

effect that the contract assailed in the bill of complaint was not in violation of the Antitrust Laws of the United States was correct, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 523.—October Term, 1932.

Central Transfer Company, Petitioner, *vs.* Terminal Railroad Association of St. Louis, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 13, 1933.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioner, a Delaware corporation engaged in the transportation of interstate freight in St. Louis, brought suit in the District Court for Eastern Missouri against respondent, Terminal Railroad Association of St. Louis, and its sixteen constituent members, interstate rail carriers having terminals in St. Louis or East St. Louis, to restrain an alleged violation of the Sherman Anti-Trust Act. The District Court dismissed the suit after a trial on the merits, on the ground that as the acts complained of involved matters within the jurisdiction of the Interstate Commerce Commission a suit to enjoin them was unauthorized under § 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. A., § 26, unless brought by the United States. The Court of Appeals for the Eighth Circuit affirmed. — F. (2d) —. This Court granted certiorari. — U. S. —.

For many years before the present suit the respondent rail carriers had maintained in St. Louis and East St. Louis certain "off track" stations for receipt and delivery of less than carload freight and by the employment of transfer companies, including petitioner, had provided for the transportation of such freight by truck between such stations and their "on track" stations, and between each of the latter in St. Louis and East St. Louis. Tariffs filed with the Interstate Commerce Commission designated all such "off track" stations and fixed line haul rates for the transportation of freight in less than carload lots between such stations and points on their lines. The "off track" stations were generally places of business of local transfer companies, including petitioner,

and the Columbia Terminals Company, also named as a defendant.

The several carriers, having proposed, in the interest of economy and efficiency, to reduce the number of "off track" stations and to employ a single transfer company in interchanging freight, the Interstate Commerce Commission, on May 2, 1927, in response to numerous petitions, ordered a general investigation of the lawfulness of this proposal and of the methods and practices of the respondents in handling less than carload freight in St. Louis and East St. Louis. On May 25, 1927, the rail carriers filed with the Interstate Commerce Commission a proposed tariff under which the number of designated "off track" stations was to be reduced from twelve to seven in St. Louis and from two to one in East St. Louis; new schedules of line haul rates, absorbing the allowances paid by the carrier for the inter-station haul, were applied between all stations in St. Louis and East St. Louis and points on the lines of the carriers. The only "off track" stations retained belonged to the Columbia Terminals Company. Those to be abandoned included three operated by petitioner and two operated and one controlled by the Columbia Terminals Company.

Thereupon, the Interstate Commerce Commission instituted a proceeding for an investigation of the lawfulness of the proposed tariffs and consolidated it with the proceeding for a general investigation already pending. In the course of the consolidated proceeding the Commission made two reports. The first, of May 13, 1929, 155 I. C. C. 129, upheld as reasonable and lawful the proposed reduction in number of "off track" stations and the employment by the several rail carriers of a single transfer company to do the inter-station hauling. The Commission found that these changes in method of handling freight under the proposed rate schedules would effect large savings in transportation costs and that the arrangement entered into to effect them was not a violation of the anti-trust laws of the United States. The proposed rate schedule was suspended, pending a cost study, at the conclusion of which the Commission, by a second report and order of July 27, 1931, 177 I. C. C. 316, approved the rate schedule as filed.

Pending the proceedings before the Commission, respondent, the Terminal Railroad Association, acting on behalf of the respondent carriers, on June 1, 1931, entered into a contract with Columbia Terminals Company, embodying the arrangement between the carriers and the Columbia Terminals Company, which is the subject

of complaint in this suit. By this contract it was agreed that the reduced number of "off track" stations named in the filed tariffs, which were places of business of the Columbia Terminals Company, should be designated and maintained as the only "off track" stations of the carriers; that the Columbia Terminals Company should have the exclusive right to transport less than carload freight between the "on track" stations and between them and the "off track" stations; that the carriers should file the necessary amended tariffs with the Interstate Commerce Commission to carry out the agreement and pay for the services rendered at prescribed rates, which were absorbed in the line haul rates ultimately approved by the Commission. The practical effect of the contract was to give the Columbia Terminals Company the exclusive right to operate the "off track" stations, to haul the interchanged freight, and thus to preclude the employment of petitioner and others in that service.

Petitioner assails the contract and the consequent refusal of the carriers to employ it and to use its places of business as stations, as creating a forbidden monopoly in restraint of interstate commerce. To this the respondents answer that the contract is concerned with matters within the jurisdiction of the Interstate Commerce Commission in respect to which the Clayton Act provides that no one except the United States may maintain a suit for an injunction. The question which we must decide is whether the petitioner is thus precluded from prosecuting the present suit.

By the Sherman Anti-Trust Act, the Government alone was authorized to maintain a suit to restrain violations of its provisions, *Paine Lumber Co.* v. *Neal*, 244 U. S. 459. Private persons were first authorized to bring suits for that purpose by § 16 of the Clayton Act [15 U. S. C. A., § 26], but with the proviso "that nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions" of the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission."

It is not denied that the respondents are common carriers subject to the provisions of the Interstate Commerce Act. 49 U. S. C. A., c. 1. Nor is it denied that by the applicable provisions of the Act the maintenance by the carriers of the "off track"

stations, the transportation service rendered in connection with them and between the "on track" stations, through the exclusive agency of a single transfer company, the restriction of the number of "off track" stations designated by filed tariffs establishing line haul rates to and from those stations, are all within the jurisdiction of the Commission.[1]

The petitioner, conceding that the Commission has jurisdiction of the service of the transfer companies in interchanging freight between the stations, insists that the Commission has no jurisdiction or control over the carrier's discretion in selecting their agents

[1]Section 12 of the Interstate Commerce Act, [§ 12, Tit. 49, U. S. C. A.] invests the Commission with broad powers to conduct proceedings to inquire into the management of the business of all carriers subject to the Act and to execute and enforce the provisions of the Act. See Smith *v.* Interstate Commerce Commission, 245 U. S. 33, 43. By paragraph 3 of § 3 of the Act [§ 3, ¶ (3), Tit. 49, U. S. C. A.], rail carriers subject to it are required to afford all "reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers or property to and from their several lines, and those connecting therewith". "Reasonable, proper and equal facilities" include not only trackage, but all other terminal facilities, all of which are brought under jurisdiction of the Commission. See Pennsylvania Company *v.* United States, 236 U. S. 351. They include privately owned warehouses designated as such by the owner, acting as the carrier's agent, United States *v.* Balt. & Ohio R. R. Co., 231 U. S. 274; see Merchants Warehouse Co. *v.* United States, 283 U. S. 501, 506, 513; cf. Interstate Commerce Commission *v.* Diffenbaugh, 222 U. S. 42, and motor truck transfer in connection with transportation by rail. In the Matter of Legality of Tariffs Purporting to Embrace Motor Truck Transfer Service, 91 I. C. C. 539; Motor Bus and Motor Truck Operation, 140 I. C. C. 685, 729; Discontinuance of Inland or Off-Track Stations in New York City, 173 I. C. C. 727; Coordination of Motor Transportation, 182 I. C. C. 263, 367; Trucking less than Carload Freight, 185 I. C. C. 71.

By § 1, par. 6 [§ 1, ¶ (6), Tit. 49, U. S. C. A.], it is made the duty of rail carriers to establish and observe just and reasonable regulations and practices affecting the "facilities for transportation" and "all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property . . . upon just and reasonable terms, and every unjust and unreasonable classification, regulation and practice, is prohibited and declared to be unlawful". See Director General of Railroads *v.* Viscose Co., 254 U. S. 498.

Section 6 (1) [§ 6 (1), Tit. 49, U. S. C. A.] requires every rail carrier to file schedules of rates applicable between different points on its own route

to perform that service, and consequently no jurisdiction over a contract by which that discretion is exercised or of a cause of action arising out of its unlawful exercise; that jurisdiction is therefore in the federal court to grant the relief prayed.

This argument misconceives both the effect and the purpose of § 16 of the Clayton Act. Under that section jurisdiction of the Commission does not delimit the jurisdiction of the federal courts to restrain violations of the Sherman Anti-Trust Act. Compare *United States* v. *Trans-Missouri Freight Ass'n,* 166 U. S. 290; *United States* v. *Joint Traffic Ass'n,* 171 U. S. 505. It affects only the capacity of a private party to maintain a suit to restrain violations. See *General Investment Company* v. *New York Central R. R.,* 271 U. S. 228. Its obvious purpose is to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the Government itself. Here the relief prayed is that performance of the contract be enjoined. Performance necessarily involves the continued designation in the filed tariffs of the Columbia Terminal Company's places of business as the "off track" stations specified in the contract, and the continued exclusive employment of that company to render the stipulated service, both matters within the jurisdiction of the Commission. True, a contract may precede and have existence apart from the several acts required to perform it, and conceivably all of those acts might be done if no contract or agreement to perform them had ever existed. But when they are done in performance of an agreement,

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and between points on its own route and on that of any other carrier when a through route has been established. They "shall plainly state the places between which property and passengers will be carried . . . and shall also state separately all terminal charges . . . and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which . . . affect . . . any part . . . of such aforesaid rates . . . or the value of the service rendered to the . . . shipper . . .". Tariffs changing the published rates are also required to be filed (§ 6 (3)), and by § 15 (7), [§ 15 (7), Tit. 49, U. S. C. A.], the Commission is authorized on its own motion to enter upon a hearing concerning the lawfulness of the rate and of any classification, regulation or practice specified in the tariff. See Director General of Railroads *v.* Viscose Co., *supra;* Texas & Pacific R. R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 437; Baltimore & Ohio R. R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481, 494.

there is no way by which the agreement itself can be assailed by injunction except by restraining acts done in performance of it. That, in this case, the statute forbids, not because the contract is within the jurisdiction of the Interstate Commerce Commission, but because the acts done in performance of it, which must necessarily be enjoined if any relief is given, are matters subject to the jurisdiction of the Commission. See *Wheeling & Lake Erie Co.* v. *Pittsburgh & West Virginia Ry.*, 33 F. (2d) 390, 392; *General Investment Co.* v. *New York Central R. R. Co.*, 23 F. (2d) 822.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.